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No. 12861

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

PINKERTON'S NATIONAL DETECTIVE AGENCY, INC., and CONTRACT GUARDS AND PATROLMEN'S ORGANIZING COMMITTEE, I.L.W.U.,

Respondents.

Transcript of Record

Petition for Enforcement of an Order of The National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

1. Pursuant to Section 10(b) of the National Labor Relations Act, the undersigned hereby charges that Pinkerton's National Detective Agency, Inc., at Monadnock Building, San Francisco, California, employing 150 workers in Patrol & Guard Service, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) subsections (1) and (3) of said Act, in that:

2. On or about July 24, 1948, it, by its officers, agents, and representatives, terminated the employment of Thomas W. Stenhouse, one of its employees, and at all times since that date has refused and does now refuse to employ the above named employee, because of threats by agents or representatives of Contract Guards and Watchmen, CIO, a labor organization, to have its members walk off the job if the above named employee, a non-member, is put to work with its members, some of whom are employees of the Employer.

By the above acts and by other acts and conduct, the Employer has interfered with, restrained and coerced its employees, and is interfering with, restraining and coercing its employees in the rights guaranteed them by Section 7 of the Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting

commerce within the meaning of said Act.

3. (Paragraphs 3, 4, and 5 apply only if the charge is filed by a labor organization). The labor organization filing this charge, hereinafter called the union, has complied with Section 9 (f) (A), 9 (f) (B) (1), and 9 (g) of said Act as amended, as evidenced by letter of compliance issued by the Department of Labor and bearing code number.... The financial data filed with the Secretary of Labor is for the fiscal year ending.....

A certificate has been filed with the National Labor Relations Board in accordance with Section 9(f)(B)(2) stating the method employed by the union in furnishing to all its members copies of the financial data required to be filed with the Secretary of Labor.

4. Each of the officers of the union has executed a non-communist affidavit as required by Section 9(h) of the Act.

5. Upon information and belief, the national or international labor organization of which this organization is an affiliate or constitutent unit has also complied with Section 9(f), (g), and (h) of the Act.

6. (Full name of labor organization, including local name and number, or person filing charge): Thomas W. Stenhouse, 3448 Telegraph, Oakland, California. Olympic 2-3425.

7. Full name of national or international labor organization of which it is an affiliate or constituent unit): An individual.

Additional Charge: Case No. 20-CA-120. Date filed 8/9/48.

/s/ By T. W. STENHOUSE,
(Signature of representative or person filing charge)

Subscribed and sworn to before me this 9th day of August, 1948, at San Francisco, Calif., as true to the best of deponent's knowledge, information and belief.

/s/ JOHN H. IMMEL, Jr.,
(Board Agent or Notary Public)

General Counsel's Exhibit 1-M.

United States of America
Before the National Labor Relations Board
Twentieth Region

Case No. 20-CA-120

In the Matter of
PINKERTON NATIONAL DETECTIVE AGENCY, INC.,

and

THOMAS W. STENHOUSE, JOHN T. CONNERS, and WALTER J. SLATER, individuals.

Case No. 20-CB-33

In the Matter of
CONTRACT GUARD'S AND PATROLMEN'S ORGANIZING COMMITTEE, I.L.W.U., and INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, C.I.O.,

and

JOHN T. CONNERS and WALTER J. SLATER, individuals.

COMPLAINT

It having been charged by Thomas W. Stenhouse, John T. Conners and Walter J. Slater, individuals, that Pinkerton National Detective Agency, Inc., herein called the respondent Company, and it having been further charged by John T. Conners and Walter J. Slater, individuals, that the Contract Guard's and Patrolmen's Organizing Committee, I.L.W.U., and the International Longshoremen's

and Warehousemen's Union, affiliated with the Congress of Industrial Organizations, herein called the respondent Unions, have engaged in and are engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C.A. 141 et seq. (Supp. July 1947), herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twentieth Region, designated by the Rules and Regulations of the National Labor Relations Board, Series 5, as amended, Section 203.15, hereby issues his Complaint upon the charges, duly consolidated pursuant to the provisions of Section 203.33(b) of the above Rules and Regulations, and alleges as follows:

I.

The respondent Company is, and at all times herein mentioned has been, a Delaware corporation engaged in the business of furnishing guards, detectives, protection personnel, and similar services to individuals and business establishments. In connection with such business it maintains regional offices in various parts of the United States, including such an office in San Francisco, California, which is the headquarters for its so-called West Coast Region. The aforesaid West Coast Region services various points on the Pacific Coast.

II.

In the West Coast Region, respondent Company, among its other functions, furnishes services to operators of ships engaged in the transportation of passengers and cargo between ports on the Pacific Coast and other ports located in various States of the United States, its territories and possessions, and in foreign countries.

III.

During the fiscal year ending December 31, 1947, respondent Company in its aforesaid West Coast Region received in excess of $600,000 for its services as described in paragraph I above, and approximately 85% of the aforesaid amount was received for its services to operators of ships as described in paragraph II above.

IV.

The Contract Guard's and Patrolmen's Organizing Committee, I.L.W.U., and the International Longshoremen's and Warehousemen's Union are each labor organizations within the meaning of Section 2, subsection (5) of the Act.

V.

The respondent Company, by its officers and agents, commencing on or about July 23, 1948, did refuse to employ and is continuing to refuse to employ Thomas W. Stenhouse because of his failure to join the Contract Guard's and Patrolmen's Organizing Committee, I.L.W.U.

VI.

The respondent Company, by its officers and agents, commencing on or about August 7, 1948, has discriminated and is now discriminating against John T. Conners and Walter J. Slater by refusing to employ or dispatch them to jobs because of their failure to maintain good standing as members of the Contract Guard's and Patrolmen's Organizing Committtee, I.L.W.U.

VII.

By the acts set forth in paragraphs V and VI above, the respondent Company did discriminate, and is now discriminating, in regard to hire and tenure of employment and terms and conditions of employment of said Thomas W. Stenhouse, John T. Conners, and Walter J. Slater, and did thereby encourage membership in labor organizations, and did thereby engage in, and is thereby engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

VIII.

By the acts set forth in paragraphs V, VI and VII above, the respondent Company did interfere with, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, and did thereby engage in unfair labor practices, and is thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

IX.

The respondent Unions, and each of them, by their officers and agents, commencing on or about August 3, 1948, restrained or coerced employees in the exercise of rights guaranteed in Section 7 of the Act, by engaging in the following acts and conduct:

1. Threatening to "pull' an employee's card so that he could not work, unless he paid dues to the Contract Guard's and Patrolmen's Organizing Committee, I.L.W.U.

2. Warning employees of the respondent Company that it would be dangerous for them to report to work on the San Francisco waterfront without "paid-up" dues books in the Contract Guard's and Patrolmen's Organizing Committee, I.L.W.U.

X.

The respondent Unions, and each of them, by their officers and agents, commencing on or about August 7, 1948, caused the respondent Company to * * *

XI.

By the acts set forth in paragraph X above, the respondent Unions, and each of them, did cause or attempt to cause an employer to discriminate against employees in violation of subsection (3) of Section 8(a) of the Act, and did thereby engage in, and is thereby engaging in unfair labor practices within the meaning of Section 8(b)(2) of the Act.

XII.

By the acts set forth in paragraphs IX and X above, the respondent Unions, and each of them,

did restrain and coerce, and are restraining and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and did thereby engage in, and are thereby engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

XIII.

The acts of the respondent Company as set forth in paragraphs V, VI and VII above, and the acts of the respondent Unions, and each of them, as set forth in paragraphs IX and X above, occurring in connection with the operations of the respondent Company described in paragraphs I, II and III above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

XIV.

The aforesaid acts of the respondent Company as set forth in paragraphs V, VI and VII above, and the aforesaid acts of the respondent Unions as set forth in paragraphs IX and X above, and each of them, constitute unfair labor practices within the meaning of Section 8(a)(1)(3) and Section 8(b)(1)(A) and 8(b)(2) and Section 2(6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board on behalf of the Board, on this 30th day of November, 1948, issues his Complaint against Pinkerton National Detective Agency,

Inc. and Contract Guard's and Patrolmen's Organizing Committee, I.L.W.U., and International Longshoremen's and Warehousemen's Union, C.I.O., the respondents named herein.

[Seal] /s/ GERALD A. BROWN,
Regional Director National
Labor Relations Board

General Counsel's Exhibit 1-Q.

[Title of Board and Cause.]

AMENDMENT TO COMPLAINT

The General Counsel of the National Labor Relations Board, on behalf of the Board, by the undersigned Regional Director for the Twentieth Region, designated by the Rules and Regulations of the National Labor Relations Board, Series 5, as amended, Section 203.17, as and for an amendment to the Complaint heretofore issued on the 30th day of November, 1948, alleges as follows:

Paragraph X of the Complaint heretofore issued is hereby amended by adding thereto after the words, "respondent Company to" in said paragraph X thereof, the following:

> "refuse to employ or dispatch John T. Conners and Walter J. Slater to jobs of said respondent Company because of said Conners' and Slater's failure to maintain good standing as members of the Contract Guard's and Patrolmen's Organizing Committee, I.L.W.U."

Wherefore, the General Counsel of the National

Labor Relations Board, on behalf of the Board, on this 1st day of December, 1948, issues this his amendment to the Complaint against Pinkerton National Detective Agency, Inc., and Contract Guard's and Patrolmen's Organizing Committee, I.L.W.U., and International Longshoremen's and Warehousemen's Union, C.I.O., the respondents herein.

[Seal] /s/ GERALD A. BROWN,
Regional Director, National
Labor Relations Board

Affidavits of Service by Mail attached.

General Counsel's Exhibit No. 1-T.

[Title of Board and Cause.]

ANSWER

Comes now Contract Guards and Patrolmen's Organizing Committee, I.L.W.U., and files this, its answer to the complaint in the above entitled cases, as follows:

I.

Denies each and every, generally and specifically, all and singular, the allegations of Paragraphs IX, X, XI, XII, XIII, and XIV of said complaint.

II.

This answering respondent is without knowledge concerning the allegations contained in Paragraphs I, II, III, V, VI, VII and VIII of said complaint, and basing its answer thereon, denies each and every, generally and specifically, all and singular,

the allegations of said Paragraphs of said complaint.

Wherefore, this answering respondent prays that the said complaint be dismissed.

GLADSTEIN, ANDERSEN, RESNER & SAWYER

/s/ By N. LEONARD,

Attorneys for Contract Guards and Patrolmen's Organizing Committee, I.L.W.U.

Duly Verified.

General Counsel's Exhibit 1-CC.

[Title of Board and Cause.]

ANSWER OF PINKERTON'S NATIONAL DETECTIVE AGENCY, INC.

Pinkerton's National Detective Agency, Inc., answers the complaint in the above entitled consolidated cases as follows:

I.

Denies generally and specifically, each and all of the allegations contained in paragraphs V, VI, VII, VIII, X, XI, XII, XIII and XIV of said complaint.

II.

Further answering the allegations contained in paragraph V of said complaint, Pinkerton's National Detective Agency alleges that at all times after July 23, 1948, Pinkerton's National Detective Agency was ready, able and willing to employ and dispatch Thomas W. Stenhouse at the same type of work as patrolman and guard as he was theretofore

employed without the necessity of joining or maintaining good standing as a member of Contract Guards and Patrolmen's Organizing Committee, I.L.W.U., or any other labor organization, but that at no time on or after July 23, 1948, did Thomas W. Stenhouse apply to Pinkerton's National Detective Agency for any job or employment of any kind.

III.

Pinkerton's National Detective Agency is without knowledge concerning the allegations contained in paragraph IX of said complaint.

IV.

Further answering the allegations contained in paragraphs VI, VII, VIII, IX, X, XI, XII, XIII and XIV of said complaint, Pinkerton's National Detective Agency alleges:

That, commencing on or about August 11, 1948, and continuously ever since, Pinkerton's National Detective Agency, unconditionally offered to, and has been ready, able and willing to employ and dispatch John T. Conners and Walter J. Slater at the same type of work as patrolmen and guards as they were theretofore employed without the necessity of joining or maintaining good standing as members of the Contract Guards and Patrolmen's Organizing Committee, I.L.W.U., or any other labor organization.

That, commencing on or about August 9, 1948, and continuously ever since, Pinkerton's National Detective Agency unconditionally offered to, and has

been ready, able and willing to employ and dispatch John T. Conners and Walter J. Slater as patrolmen and guards on industrial jobs without the necessity of joining or maintaining good standing as members of Contract Guards and Patrolmen's Organizing Committee, I.L.W.U., or any other labor organization.

That, at all times from and after August 9, 1948, John T. Conners and Walter J. Slater have refused to accept employment by Pinkerton's National Detective Agency or to be dispatched either at the same type of work as they were theretofore employed or as patrolmen and guards on industrial work.

That, on or about the second day of September, 1948, a strike was called by I.L.W.U. against the Waterfront Employers Association of the Pacific Coast. That said strike continued in effect until the sixth day of December 1948. That, as a result of said strike, and for the duration of said strike, virtually all shipping in and out of San Francisco was suspended. That, as a result of said suspension of shipping operations, the services of Pinkerton's National Detective Agency on the waterfront were reduced by more than fifty per cent during said period, and for said reason the said Thomas W. Stenhouse, J. T. Conners and Walter J. Slater would not have been employed more than one-half of the time from the second day of September 1948 to the sixth day of December 1948 by Pinkerton's National Detective Agency.

Wherefore, Pinkerton's National Detective

Agency, Inc. prays that the above entitled matter be dismissed.

PINKERTON'S NATIONAL DETECTIVE AGENCY, INC.

/s/ By J. O. CAMDEN,
Assistant General Manager.

Duly Verified.

General Counsel's Exhibit No. 1-EE.

[Title of Board and Cause.]

AMENDED COMPLAINT

It having been charged by Thomas W. Stenhouse, John T. Conners, Walter J. Slater, and Charles O. Holmes, individuals, that Pinkerton National Detective Agency, Inc., herein called the respondent Company, and it having been further charged by John T. Conners, Walter J. Slater, and Charles O. Holmes, individuals, that the Contract Guards and Patrolmen's Organizing Committee, I.L.W.U., and the International Longshoremen's and Warehousemen's Union, affiliated with the Congress of Industrial Organizations, herein called the respondent Unions, have engaged in and are engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C.A. 141 et seq. (Supp. July 1947), herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twentieth Region, designated by the Rules and Regulations of

the National Labor Relations Board, Series 5, as amended, Section 203.15, hereby issues his Complaint upon the charges, duly consolidated pursuant to the provisions of Section 203.33(b) of the above Rules and Regulations, and alleges as follows:

I.

The respondent Company is, and at all times herein mentioned has been, a Delaware corporation engaged in the business of furnishing guards, detectives, protection personnel, and similar services to individuals and business establishments. In connection with such business it maintains regional offices in various parts of the United States, including such an office in San Francisco, California, which is the headquarters for its so-called West Coast Region. The aforesaid West Coast Region services various points on the Pacific Coast.

II.

In the West Coast Region, respondent Company, among its other functions, furnishes services to operators of ships engaged in the transportation of passengers and cargo between ports located in various States of the United States, its territories and possessions, and in foreign countries.

III.

During the fiscal year ending December 31, 1947, respondent Company in its aforesaid West Coast Region received in excess of $600,000 for its services as described in paragraph I above, and approximately 85% of the aforesaid amount was received

for its services to operators of ships as described in paragraph II above.

IV.

The Contract Guards and Patrolmen's Organizing Committee, I.L.W.U., and the International Longshoremen's and Warehousemen's Union, affiliated with the Congress of Industrial Organizations, are each labor organizations within the meaning of Section 2, subsection (5) of the Act.

V.

The respondent Company, by its officers and agents, commencing on or about July 23, 1948, did refuse to employ and is continuing to refuse to employ Thomas W. Stenhouse because of his non-membership in good standing in the Contract Guards and Patrolmen's Organizing Committee, I.L.W.U.

VI.

The respondent Company, by its officers and agents, commencing on or about August 7, 1948, has discriminated and is now discriminating against John T. Conners, Walter J. Slater, and Charles O. Holmes by refusing to employ or dispatch them to maritime jobs because of their failure to maintain good standing as members of the Contract Guards and Patrolmen's Organizing Committee, I.L.W.U.

VII.

By the acts set forth in paragraphs V and VI above, the respondent Company did discriminate, and is now discriminating, in regard to hire and tenure of employment and terms and conditions of employment of said Thomas W. Stenhouse, John T.

Conners, Walter J. Slater, and Charles O. Holmes, and did thereby encourage membership in labor organizations, and did thereby engage in, and is thereby engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

VIII.

By the acts set forth in paragraphs V, VI and VII above, the respondent Company did interfere with, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, and did thereby engage in unfair labor practices, and is thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

IX.

The respondent Unions, and each of them, by their officers and agents, commencing on or about August 3, 1948, restrained or coerced employees in the exercise of rights guaranteed in Section 7 of the Act, by engaging in the following acts and conduct:

1. Threatening to "pull" an employee's card so that he could not work, unless he paid dues to the Contract Guards and Patrolmen's Organizing Committee, I.L.W.U.

2. Warning employees of the respondent Company that it would be dangerous for them to report to work on the San Francisco waterfront without "paid-up" dues books in the Contract Guards and Patrolmen's Organizing Committee, I.L.W.U.

X.

The respondent Unions, and each of them, by their officers and agents, commencing on or about August 7, 1948, caused the respondent Company to refuse to employ or dispatch John T. Conners, Walter J. Slater and Charles O. Holmes to maritime jobs of said respondent Company because of said Conners', Slater's, and Holmes' failure to maintain good standing as members of the Contract Guards and Patrolmen's Organizing Committee, I.L.W.U.

XI.

By the acts set forth in paragraph X above, the respondent Unions, and each of them, did cause or attempt to cause an employer to discriminate against employees in violation of subsection (3) of Section 8(a) of the Act, and did thereby engage in, and is thereby engaging in unfair labor practices within the meaning of Section 8(b)(2) of the Act.

XII.

By the acts set forth in paragraphs IX and X above, the respondent Unions, and each of them, did restrain and coerce, and are restraining and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and did thereby engage in, and are thereby engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

XIII.

The acts of the respondent Company as set forth in paragraphs V, VI and VII above, and the acts

of the respondent Unions, and each of them, as set forth in paragraphs IX and X above, occurring in connection with the operations of the respondent Company described in paragraphs I, II and III above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

XIV.

The aforesaid acts of the respondent Company as set forth in paragraphs V, VI, and VII above, and the aforesaid acts of the respondent Unions as set forth in paragraphs IX and X above, and each of them, constitute unfair labor practices within the meaning of Section 8(a)(1) and (3) and Section 8(b)(1)(A) and 8(b)(2) and Section 2(6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board on behalf of the Board, on this 15th day of February, 1949, issues his Complaint against Pinkerton's National Detective Agency, Inc., and Contract Guards and Patrolmen's Organizing Committee, I.L.W.U., and International Longshoremen's and Warehousemen's Union, C.I.O., the respondents named herein.

[Seal] /s/ GERALD A. BROWN,
Regional Director National
Labor Relations Board

General Counsel's Exhibit No. 1-FF.

[Title of Board and Cause.]

ANSWER OF PINKERTON'S NATIONAL DETECTIVE AGENCY, INC.

Pinkerton's National Detective Agency, Inc. further answers the complaint in the above entitled consolidated cases as follows:

I.

Pinkerton's National Detective Agency, Inc. hereby adopts, reaffirms and incorporates by reference as though fully set forth herein all of the denials, allegations and other matters set forth in the answer of Pinkerton's National Detective Agency, Inc. filed herein on or about January 31, 1949, as the answer of Pinkerton's National Detective Agency, Inc. to the amended complaint herein issued on or about February 15, 1949.

II.

Further answering the allegations contained in paragraphs VI, VII, VIII, IX, X, XI, XII, XIII and XIV of said amended complaint, Pinkerton's National Detective Agency, Inc. alleges that from and after August 7, 1948, until September 2, 1948, Pinkerton's National Detective Agency, Inc. employed Charles O. Holmes as a guard on waterfront work whenever such work was available, and that from and after September 2, 1948, Pinkerton's National Detective Agency, Inc. employed Charles O. Holmes as a guard on industrial work until Novem-

ber 13, 1948, at which time Charles O. Holmes voluntarily quit and terminated his employment.

That on or about the 2nd day of September, 1948, a strike was called by I.L.W.U. against the Waterfront Employers Association of the Pacific Coast. That said strike continued in effect until the 6th day of December, 1948. That as a result of said strike and for the duration of said strike virtually all shipping in and out of San Francisco was suspended. That as a result of said suspension of shipping operations the services of Pinkerton's National Detective Agency, Inc. on the waterfront were reduced by more than fifty per cent during said period, and for said reason the said John T. Conners and Walter J. Slater would not have been employed more than one-half of the time from the 2nd day of September 1948, to the 6th day of December 1948, by Pinkerton's National Detective Agency, Inc., and that Thomas W. Stenhouse and Charles O. Holmes would not have been employed for any waterfront work during said period.

Wherefore, Pinkerton's National Detective Agency, Inc. prays that the above-entitled matter be dismissed.

PINKERTON'S NATIONAL DETECTIVE AGENCY, INC.

By /s/ J. O. CAMDEN,
Assistant General Manager

Duly Verified.

Received March 29, 1949, N.L.R.B.

General Counsel's Exhibit 1-II.

[Title of Board and Cause.]

INTERMEDIATE REPORT

Robert V. Magor, for General Counsel; Gladstein, Andersen, Resner and Sawyer, by Norman Leonard, for Contract Guards and International; Roth and Bahrs, by George O. Bahrs, for Pinkerton's.

Statement of the Case

Upon charges and amended charges duly filed by Thomas W. Stenhouse, John T. Conners, and Walter J. Slater against Pinkerton's National Detective Agency, Inc., herein called Pinkerton's, (being Case No. 20-CA-120), and by John T. Conners and Walter J. Slater against the Contract Guard's and Patrolmen's Organizing Committee, herein called the Organizing Committee, and International Longshoremen's and Warehousemen's Union, affiliated with the Congress of Industrial Organizations, herein called International, (being Case No. 20-CB-33), the General Counsel of the National Labor Relations Board, herein, respectively, called the General Counsel and the Board, by the Regional Director for the Twentieth Region (San Francisco, California), issued his complaint on November 30, 1948,[1] alleging that Pinkerton's had engaged in, and is engaging in, unfair labor practices affecting commerce, within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat 136, herein

[1] On the same day, the said Regional Director, pursuant to Section 203.33 (b) of the Board's Rules and Regulations—Series 5, issued an order consolidating the above numbered cases.

called the Act, and that the Organizing Committee and the International had engaged in, and are engaging in, unfair labor practices affecting commerce, within the meaning of Section 8(b)(1)(A), (b)(2), and Section 2(6) and (7) of the Act.

Copies of the complaint, charges, amended charges, notice of hearing, and order of consolidation were duly served upon Stenhouse, Conners, Slater, Pinkerton's, the Organizing Committee, and the International.

On December 1, 1948, the said Regional Director served upon the parties copies of an "Amendment to Complaint."

On December 6, 1948, Charles O. Holmes duly filed with the said Regional Director in Case No. 20-CA-120 a charge against Pinkerton's and in Case No. 20-CB-33 a charge against the Organizing Committee and the International.

On February 1, 1949, Pinkerton's, the Organizing Committee, and the International each duly filed answers wherein each Respondent admitted certain allegations of the complaint but denied the commission of any of the alleged unfair labor practices.

On February 15, 1949, the said Regional Director issued a "Notice of Consolidated Hearing on Amended Complaint."[2] On the same day, copies of

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[2] The notice or order recited, in substance, that after the issuance of the complaint and the amendment thereto, Holmes filed charges against Pinkerton's, the Organizing Committee, and the International and the Regional Director decided that, in order to effectuate the purposes of the Act, all the

the Amended Complaint, annexed to which were copies of the charges and amended charges filed by the four complainants herein, and Notice of Consolidated Hearing were duly served upon Pinkerton's, the Organizing Committee, the International, and the four complainants herein.

With respect to the unfair labor practices of Pinkerton's the amended complaint alleged in substance that (1) since July 23, 1948, it has refused, and still refuses, to employ Stenhouse because of his non-membership in good standing in the Organizing Committee; (2) since August 7, 1948, it has refused, and still refuses, to employ, or dispatch to maritime jobs, Conners, Slater, and Holmes because they have, and each of them has, failed to maintain membership in good standing in the Organizing Committee; and (3) by such acts and conduct it has interfered with the rights guaranteed Stenhouse, Conners, Slater, and Holmes in Section 7 of the Act, thereby violating Section 8 (a) (1) and (3) thereof.

With respect to the unfair labor practices of the Organizing Committee and the International, the amended complaint alleged, in substance, that they, and that each of them, (1) threatened that they would "pull" the card of any Pinkerton's employee so that he could not work for Pinkerton's unless he

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charges should be considered together and hence he issued the above-mentioned notice or order consolidating the cases of Stenhouse, Conners, Slater, and Holmes. The notice or order further provided that the answers previously filed by Pinkerton's, the Organizing Committee, and the International be "deemed as answers to the similar allegations in the attached Amended Complaint." Despite this recital, Pinkerton's, nonetheless, duly filed an answer to the amended complaint.

paid dues to the Organizing Committee; (2) warned Pinkerton's employees that it would be dangerous for them to work on the San Francisco water front without paid-up dues books of the Organizing Committee; (3) since on or about August 7, 1948, caused Pinkerton's to refuse employment to Conners, Slater, and Holmes because of their failure to maintain membership in good standing in the Organizing Committee; and (4) by such actions they have, and each of them has, restrained and coerced Pinkerton's employees in the exercise of the rights guaranteed in Section 7 of the Act thereby violating Section 8 (b) (1) (A) and 8 (b) (2) thereof.

On March 3, 1949, Pinkerton's duly filed an answer to the amended complaint denying the commission of any of the alleged unfair labor practices. The answers previously filed by the Organizing Committee and International to the complaint were deemed to include denials of all and any unfair labor practices alleged to have been committed by them in the amended complaint.

Pursuant to notice, a hearing was held in San Francisco, California, from March 29 to 31, 1949, both dates inclusive, before Howard Myers, the undersigned Trial Examiner who had been duly designated by the Chief Trial Examiner. The parties were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues was afforded all parties. Before the taking of any evidence, counsel for the International moved to dismiss the complaint as against it because the charges and amended

charges were not served upon the International within the time specified for such service in Section 10(b), of the Act. The motion was denied with permission to renew. At the conclusion of the General Counsel's case-in-chief, counsel for the International renewed his motion to dismiss the complaint because of lack of due and timely service of the charge and amended charges and for failure of proof. The motion was denied. Likewise the motion of the Organizing Committee to dismiss the complaint for lack of proof was denied. At the conclusion of the taking of the evidence, the General Counsel's motion to conform the pleadings to the proof with respect to minor variances was granted without objection. Counsel for the Organizing Committee and the International then renewed his motions to dismiss the complaint. Decisions thereon were reserved. The motion that the complaint be dismissed as to the International because of lack of due and timely service is denied. Not only was the charges and amended charges served within the required time, but admittedly shortly after the original charges of Stenhouse, Conners, and Slater were filed with the Regional Director copies thereof were sent to counsel for the International pursuant to his standing request that copies of all charges filed against the International be sent to him as soon as filed. The International and its counsel received a copy of the charges and amended charges of Stenhouse, Conners, and Slater prior to December 3, 1948,[3] because

[3] Holmes filed his charges on December 6, 1948, and due and timely service of those charges were made upon all the Respondents herein.

on that day counsel for the International and Organizing Committee requested in writing an extension of time to file an answer, which request was granted. Moreover, an answer was duly filed by the International on February 1, 1949, which was within the 6-month period for service of charges prescribed in Section 10 (b) of the Act. The motions of the Organizing Committee and the International to dismiss the complaint for lack of proof are disposed of in the body of this Report.

At the conclusion of the hearing oral argument, in which counsel for all parties participated, was heard. The parties were then informed that they might file briefs and proposed findings of fact and conclusions of law with the undersigned within 15 days after the close of the hearing.[4] Briefs have been received from counsel for Pinkerton's and the Respondent Unions, and from the General Counsel, which briefs have been duly considered by the undersigned.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. The business of Pinkerton's

Pinkerton's National Detective Agency, Inc., a Delaware corporation, is engaged in the business of furnishing guards, detectives, protection personnel, and similar services to individuals and business

[4] At the request of counsel for the Respondent Unions, the time to file briefs was extended to May 6, 1949.

establishments. In connection with such business Pinkerton's maintains regional offices in various parts of the United States, including an office in San Francisco, California, which is the headquarters of its West Coast Region and the employees of which region are the only ones involved in this proceeding.

In its West Coast Region, Pinkerton's, among other functions, furnishes guards and services to operators of ships engaged in the transportation of passengers and cargo between ports located in the various States of the United States, its territories and possessions, and in foreign countries.

During the fiscal year ending December 1947, Pinkerton's in its West Coast Region received in excess of $600,000 for its services approximately 85 percent of which amount was received from employees engaged in transporting passengers and cargo in interstate and foreign traffic. During all times material herein, a substantial amount of Pinkerton's West Coast Region income was received in payment of services rendered to employers engaged in interstate and foreign traffic.

Pinkerton's concede, and the undersigned finds, that during all the times material herein Pinkerton's was, and still is, engaged in commerce, within the meaning of the Act.

II. The labor organizations involved

Contract Guard's and Patrolmen's Organizing Committee, affiliated with the International Longshoremen's and Warehousemen's Union and the Longshoremen's and Warehousemen's Union, af-

filiated with the Congress of Industrial Organizations, are labor organizations admitting to membership employees of Pinkerton's.

III. The unfair labor practices

A. Interference, restraint, and coercion by Pinkerton's; restraint and coercion by Organizing Committee; the discharges; and the refusal to employ Stenhouse.

1. The pertinent facts

Under date of August 1, 1946, the International, acting in behalf of certain of its Locals,[5] entered into a written contract with Pinkerton's. The contract, by its terms was to remain in full force and effect until June 15, 1947, and was to be renewed from year to year thereafter unless either party gave notice to the other party in writing of its desire to modify or terminate it not less than 60 days prior to its anniversary dates.

The sections of the aforementioned contract which directly bear upon the pertinent issues of this proceeding read, in part, as follows:

Section I. Recognition:

The Employer (Pinkerton's) recognizes the Union (the International in behalf of the stated Locals) as the sole collective bargaining agent * * * for all persons employed as guards and patrolmen * * *.

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[5] Being Locals 34 (San Francisco Bay Area), Local 6 (Stockton), Local 40 (Portland, Columbia River Area), and Local 26 (Long Beach, Wilmington, and San Pedro Area).

Section II. Union Shop:

It is understood in hiring to fill all vacancies or new positions, the Employer will, under this Agreement, choose his own source of new employees. The Employer agrees to notify the Union of such employment. New employees so hired under and subject to this Contract shall join the Union within fifteen (15) days of the date of their employment.

The Employer agrees to terminate with forty-eight (48) hours the employment of any employee who becomes delinquent and in bad standing with the Union.

Section XIV. Labor Relations Committee:

(a) The Union and Employer shall each appoint an equal number of representatives to constitute a Labor Relations Committee in each port. * * *

(b) To certify the list of registered men composed of present employees and to make such additions to the registered list from the Employer's list of extra men when increased work opportunities warrant. No employee not on the registered list may be employed while there is any employee on the registered list qualified, ready, and willing to go to work.

The Labor Relations Committee was established pursuant to the provisions of the contract and, although the composition thereof changed, the committee, among other things, periodically prepared register lists of persons who, under the contract, were eligible to be placed thereon. Such a committee was functioning at the time of the present hearing.

The said agreement of August 1, 1946, was re-

newed by consent of the parties thereto on June 15, 1947, and again on June 15, 1948. In fact, the said agreement, especially the union-shop provision thereof, was still in force and effect at the time of the hearing herein.

Sometime in December 1947, Local 34 sequestered its maritime guards and patrolmen members and placed them into an organization known as the Contract Guard's Organizing Committee, which organization was chartered by the International in January 1949. Since the sequestration, the members of the Organizing Committee functioned, with respect to their employment with Pinkerton's, and with the latter's tacit approval, under the aforementioned 1946 contract and the several renewals thereof.

Sometime between June 15 and August 7, 1948, representatives of Pinkerton's and representatives of the Organizing Committee met. According to the credited testimony of J. O. Camden, Pinkerton's assistant manager and manager of its West Coast Region, "the primary purpose" of the meeting was to resolve the question with respect to the enforcement of the union-shop agreement of the August 1946 contract. Pinkerton's representatives and its attorneys, who also were at the meeting, took the position that the union-shop provision of the contract was repugnant to the Act while, on the other hand, the representatives of the Organizing Committee and its attorney, who also was at the meeting, contended that since the contract had automatically renewed itself all the provisions thereof were still

in full force and effect. The record does not indicate the outcome of this meeting.

According to the credited testimony of Thomas W. Stenhouse, one of the complainants herein, he was first employed by Pinkerton's in 1945, and after about 7 months' employment as a water-front guard he quit; he was rehired in June 1946, and worked continuously thereafter as such a guard until March 29, 1948; on that day he received a telephone call from Pinkerton's Dispatcher Jamison informing him that Michael Johnson, the Organizing Committee's organizer, had informed Pinkerton's that he could no longer work for Pinkerton's as a water-front guard; and when he asked Jamison the reason for such action, Jamison stated that Johnson was writing a letter giving his reasons for the requested discharge. Under date of March 31, 1948, Johnson wrote Pinkerton's demanding Stenhouse's immediate discharge because he was delinquent in his dues.[6] Pursuant to Johnson's demand, Stenhouse was laid off on March 31, and has not worked for Pinkerton's since that date.

Under date of July 7, Johnson addressed a letter "To All Pinkerton's Guards" reading, in part, as follows:

In order to dispel some of the confusion among the membership I am writing each member regarding the following:

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[6] Stenhouse joined Local 34 in or about August 1946 and ceased paying dues to that organization or to the Organizing Committee sometime prior to February 1948.

(1) The coastwide agreement between ILWU-CIO and the Pinkerton's Agency has been extended to June 15, 1949 by mutual agreement between the Company and the Union, and all of its terms and conditions are in effect and full force until that date. Anyone who tells you any different is just a plain bar and is only doing so to break down your union—the union that raised your wages $4.00 a day in two years.

On July 19, Stenhouse went to Camden's office and requested a job as a water-front guard. After some discussion regarding whether under the Act, Pinkerton's refusal to give Stenhouse employment would be a violation of the Act, Camden requested Stenhouse to telephone him later in the day. Pursuant, to Camden's request, Stenhouse telephoned him about 4'o'clock that afternoon, and Camden told Stenhouse, to quote Camden's testimony, "We will put you back to work. Hold yourself available for an assignment on Monday."[7]

Not hearing from the dispatcher as to any assignment, for it was the normal practice for the dispatcher to telephone the guards with respect to their assignments unless the guard was on a permanent assignment, Stenhouse telephoned the dispatcher the following day, July 20, and was informed that he knew of no assignment for him.

On July 21, Stenhouse telephoned Camden to inquire why he did not receive the promised assignment. Camden, according to Stenhouse's testimony,

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[7] Evidently Camden was in error with respect to the day of the week, for July 19, was a Monday.

which the undersigned finds to be substantially in accord with the facts, said "It's my fault, Mr. Stenhouse. I failed to tell them. You will get your four days' pay anyhow, and your five days for the following week." Stenhouse received the promised 4 days' pay on July 23, but was not paid for the following week. This was the last pay received by Stenhouse from Pinkerton's.

According to Stenhouse on Monday, July 26, he went to Pinkerton's and there saw the Captain of the Guards and that the following then ensued:

A. Captain Girard asked me if I had seen Mr. Camden. I says, "no". He says, "He wants to see you." So, we both walked in the office together. Mr. Camden, after we got sit down, he said, "I just wanted to explain to you, Stenhouse, what the situation is. They are going to walk off the job if you walk on." "Well," I said, "if I was as selfish as they are—they don't care whether I work or not, and I got four children to feed, I shouldn't care whether they work or not. So if you lose your contract with the A.P.L., they would naturally lose their jobs." So, he says, "Well, I will tell you before we go any further with this, I would like to talk to Mr. Kilpatrick," who is some kind of a head man at the APL.

Q. Would you explain what you mean by the APL?

A. American President Lines. Steamship lines. Steamship. I asked him how long it would take him to do this. He said, "Wednesday or not later than Thursday." I said, "Okay". * * *

Camden's version of the July 27 meeting is as follows:

A. * * * On the Friday of that week, he came into the office, and I told him there had been no assignments. At that time Mr. Stenhouse was president of an independent guard and watchmen's union. Later he had discussed his connection with that organization with me and had advised me that he was attempting to cause our guards to become members of that organization; that he had also conferred with the representatives of the Waterfront Employers' Association. Prior to that time they had made a statement that in negotiating contracts for waterfront guards in the future, they would not employ either AFL or CIO guards; that it would have to be some guard organization that complied with the terms of the Taft-Hartley Act. On this Friday, when Mr. Stenhouse came in, I said to him, "It is evident now that there will be a waterfront strike September 2nd. That is a foregone conclusion, and no one knows what the outcome of this will be. In any event, it will iron out the situation of waterfront guards. Because of your connection, as President of this independent organization, it seems to me that it would be best for all concerned that we did not attempt to use you any further", and Mr. Stenhouse agreed with that, and from that day until this, there has never been any question about employment with us for him.

Stenhouse appeared to the undersigned to be a forthright and honest witness. On the other hand, Camden gave the undersigned the impression that

he was withholding the true facts through fear that he may say something that might be detrimental to the case of the Respondent Unions. While being examined by the General Counsel, Camden repeatedly looked inquiringly at Johnson, who sat at the table next to the counsel for the Respondent Unions, before answering the questions propounded to him by the General Counsel. In fact, on one occasion the undersigned had to request Camden to look away from Johnson and to look at Mr. Magor, the representative of the General Counsel, who was then questioning him. While the undersigned did not see any evidence of any improper conduct on Johnson's part, nor does the undersigned believe that Johnson or counsel for any of the Respondents did anything improper, nonetheless the undersigned finds that Camden was not a straightforward witness. Accordingly, the undersigned finds that Stenhouse's version of what transpired at the July 26 meeting to be substantially in accord with the facts.

During the first week of August, the Organizing Committee called a strike of its water-front guards. On August 7, the following agreement was entered into:

Return to Work Agreement

In meeting held today, August 7, 1948 under the auspices of the Federal Mediation and Conciliation Service, the International Longshoremen's and Warehousemen's Union on behalf of ILWU Contract Guard's and Patrolmen hereafter referred to as the Union and the Pinkerton's National Detective Agency hereinafter referred to as the employer who

are parties to the labor agreement dated August 1, 1946 as renewed on June 15, 1947 and June 15, 1948 due hereby agree as follows:

1. Preference of employment shall be given to members of the Union who are available, willing and able to work.

2. When new men are employed they will be notified that there is a labor agreement existing between the Employer and the Union.

3. The Union will be furnished each day a list containing the names, addresses and telephone number of all new employees.

4. When an employer is discharged or suspended the Employer shall within twenty-four hours following such discharge furnish the Union with a complete statement setting forth in detail the reasons for the discharge or suspension.

5. Section 10 of the labor agreement "vacations" sets forth all of the qualifications for vacation pay and no other qualifications shall be added.

6. Representatives of the Employer and the Union will meet within the next seven days to revise the current registration list.

7. Preference of employment on steady jobs shall be given according to seniority to men on the registration list.

8. There shall be no discrimination or reprisal by the Employer against any employee in this dispute.

Signed in San Francisco, California, this seventh day of August, 1948.

Pinkerton's National Detective Agency, Inc.
International Longshoremen's and Warehousemen's Union

About 9 o'clock on the night of August 7, a substitute dispatcher telephoned John T. Conner, one of the complainants herein who had worked continuously for Pinkerton's as a water-front guard since his employment by it on September 23, 1946, and who had joined Local 34 about 15 days after being first employed, and told Conners that he was not to report to his regular assignment.

On the following morning, August 8, Conners telephoned, O'Neal the regular dispatcher, and according to Conners' undenied and credible testimony the following conversation was had:

A. I said, "Mr. O'Neal," I said, "What is the score?" "Well," he said, "We got a list of names here that Mike Johnson brought up to us, and your name is on the list of non-payment of dues. So, we can't do anything about it." "Well," I says, "It's funny, can't you see somebody or something," and he said, "I'll try to get ahold of Captain Gerard and Mr. Camden and phone you back." And that's the last I heard of it.

On August 9, Conners, accompanied by Stenhouse, went to Camden's office and informed Camden that he had had a steady job on the S. S. Marine Lynx but that someone had "pulled" his card and hence he was taken off the job by the dispatcher. After making some inquiries, Camden told Conners to see the Captain of the Guards about the matter. Conners did as requested and was told by the Captain

of the Guards that he could not work for Pinkerton's because his name was on the list presented by Johnson to Pinkerton's of those members of the Organizing Committee who were delinquent in their dues.[8]

On August 10, a substitute dispatcher telephoned Conners and told him to report for work the next night at a certain pier on the "graveyard" shift. The following morning, Conners telephoned Camden and asked him whether he should carry a gun on the assigned job because of the dangerous location of the job plus the fact that he was not a paid-up member in the Organizing Committee. Conners added that he thought his life would be in jeopardy and therefore thought it advisable to arm himself. Camden told Conners not to carry a gun to work. Later in the day, Camden informed Conners that he should not report to the assignment.

On September 16, Dispatcher O'Neal telephoned Conners and assigned him to a job. Conners told O'Neal that he did not have a paid-up dues book and inquired whether the Organizing Committee would give him a clearance. O'Neal replied that that matter had been arranged for and that Conners should see Johnson and obtain a clearance from him.

That afternoon, September 16, Conners accompanied by Walter J. Slater, another complainant herein, called upon Johnson, whose offices were located in the rear of a restaurant and tavern. According to the credible and undenied testimony of

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[8] Conners ceased paying dues to Local 34 or to the Organizing Committee in May 1948.

Conners, whose testimony regarding this incident is substantially corroborated by that of Slater, the following transpired in Johnson's office.

Q. (By Mr. Magor): What did you have to say to Mike Johnson when you saw him at that time?

A. Well, we said, we mentioned that we come down there for a clearance. The first words he says "Well," he says, "You got a hell of a crust coming down here."

Q. What did you say to that?

A. Well, I says, "A man's got to live," I said, "work," I says. "Well," he says, "I don't know. You guys got jurisdiction." He says, "You fellows taking—going down there on the waterfront," he says, "with all the marine cooks, radio men, marine firemen, marine engineers, longshoremen,"—he says —he says, "I am not responsible for what happens down there."[9] And he says—he said, "I don't know if I will give you fellows a clearance or not." And then he stayed there for a while, about five minutes, and then he said, "I am going out to make a phone call." So, he went out and made a phone call, I guess he did, I don't know, and pretty soon, about

[9] At that time there was a general water-front strike on the West Coast and no one was allowed to pass through the picket line in order to work without first obtaining a clearance from a committee composed of representatives of the striking unions. Several affiliates of the International, among others, were on strike. Before any water-front guard was permitted to pass through the picket line he would have to secure a clearance from Johnson or some other authorized representative of the Organizing Committee.

five minutes after, a fellow named—I don't know his last name—worked for the Pinkerton's Agency, they called him "Frenchy" is his first name—he came in and says "What the hell you guys doing here?" And I says, "Is it any of your business what I am doing here?" I said, "I am doing business with Mike Johnson." "Well," he says, "I am on the committee." I says, "I don't know anything about that," I says, "That's all." Then he went out and that's all the further we—and we sat there and that was all.

* * * * *

Q. (By Mr. Magor): Did Mike Johnson ever come back?

A. No. We sat there for forty-five minutes. At different times I went through the hallway, and Mike Johnson was sitting in the saloon there.

* * * * *

Q. Did you see Mike Johnson as you left?

A. I saw him sitting in the—on the stool in the saloon as we left.

Q. Did he say anything to you?

A. No sir.

The following day, September 16, Conners saw the Captain of the Guards, O'Neal, and another dispatcher regarding a work assignment. While they were discussing the matter, Johnson called on the telephone. According to the undenied and credible testimony of Conners the following then ensued:

* * * O'Neal went to the phone and answered, and Mike Johnson had rang up. He says, "Where are them guys that wanted that clearance, to come down

here. They going to come down here or not?" I says, "O'Neal, you go back and ask Mike Johnson if a man has to have his book paid up—full book paid up?" He said—I could hear it as well as I know my own name, he says, "Certainly," over the phone.

Q. Did Mr. O'Neal come back after that conversation?

A. Yes sir.

Q. What did Mr. O'Neal say?

A. He told Captain Gerard and Mr. Baxter the same thing as he told me, but I heard it myself.

Q. What did he say?

A. He says, "Certainly you have to have the dues in the book paid up," and Captain Gerard says, "That's news to me."

Q. Did they offer you any assignment at that time?

A. No sir. I says, "Captain, what are we going to do with the situation. I can't afford to lay around here." "Well," he says, "I don't know what to do about it," he says. "I will let you know later." I said, "Well, you going to give me a ring or assignment, or what you going to do about it?" He says, "Well, I will let you know later." That was all.

On October 7, a dispatcher, by telephone, offered Conners a 2-day assignment guarding an industrial building. Conners refused the assignment because it would not only interfere with his acceptance of another job which he had just secured and to which he was to report on the second day of the proffered assignment by the dispatcher but also for the reason

that the proffered assignment was not substantially equivalent to the position which he held with Pinkerton's plus the fact that industrial work paid 30 cents per hour less than what Conners received for water-front work.

According to the credited testimony of Walter J. Slater, he was first employed by Pinkerton's about October 1, 1946; he joined Local 34 about 15 days later; he did not pay any dues to the Organizing Committee or to Local 34 after May 1948; except for a period of about 1 month when he was assigned to industrial work, he worked exclusively for Pinkerton's as a water-front guard.

Slater testified without contradiction, and the undersigned finds, that sometime between July 20 and 25, Johnson called him on the telephone and said "unless you get over here and pay some dues, you are not going to work"; that he replied, "Who the hell do you think you are?"; and that Johnson then said "If you don't get over here and pay some dues, I'll show you. Now, I'll give you until Thursday to get over here and pay them dues, or you don't work."

The same day that the above-related telephone call took place or the following day, Slater related the Johnson telephone conversation to O'Neal, who merely said, "I have no comment at this time."

Upon completion of his day's work on August 6, Slater telephoned O'Neal regarding his next assignment. O'Neal instead of giving Slater an assignment, said, to quote Slater's credible and undenied testimony, "Don't you know that we have got a

strike on here on account of you fellows?'' O'Neal then informed Slater that he would communicate with him later.

On August 7, Dispatcher Jamison asked Slater to take a 1-day industrial assignment as a special favor to him which Slater did. The following day, August 8, Slater telephoned O'Neal to ascertain when he would receive his next water-front assignment. O'Neal replied ''Until this strike[10] is settled, we cannot give you any information.''

Around the middle of August, Slater was assigned to a water-front job. Upon being advised of the assignment, Slater spoke to Camden on the telephone and asked him, to quote Slater's credible and undenied testimony, ''if he [Camden] thought it would be advisable for me to take the assignment at Pier 41, when conditions were as they were, and he says, ''No, Slater. I don't think it would be advisable. I thank you for calling me, and I will have you released from this assignment, and I will call you back later and talk to you.' ''

In the latter part of August or early in September when the dispatcher assigned Slater to his next assignment, he asked the dispatcher whether he thought he should accept the assignment without a clearance from Johnson. The dispatcher then suggested that he and Conners see Johnson and obtain clearances to go through the picket lines of the striking water-front employees. Slater and Conners

[10] This strike was called by the Organizing Committee and was settled pursuant to the ''Return to Work Agreement'' set out at length above.

saw Johnson, and the results of their efforts to obtain clearances are fully set forth above. Johnson did not give the clearances and Slater has not worked for Pinkerton's since August 7. Slater, however, was offered industrial work, which he declined because it was less desirable than water-front work and it paid 30 cents per hour less.

According to the credited testimony of Walter L. Holmes, one of the complainants herein, he was first employed by Pinkerton's on June 13, 1946, as a water-front guard; he joined Local 34 about a month after the commencement of his employment; he ceased paying dues to the Organizing Committee or to Local 34 after June 1, 1948; he normally worked as a water-front guard during his entire employment with Pinkerton's.

Holmes testified without contradiction and the undersigned finds, that for approximately 6 months prior to August 7, he worked steadily as a guard on the S. S. Marine Lynx; that after finishing his day's work on August 7, he telephoned the dispatcher about his next assignment; and that the dispatcher said, "I am sorry, Holmes, but you can't go to work tomorrow, * * * Michael Johnson just handed us a list of men that can't go to work, and your name is on the list."

On August 9, Holmes sent Johnson a letter enclosing his dues book and a postal money order for $5 in payment of his July and August 1948 dues. A few days later, the letter and money order was returned to Holmes but not the dues book.

On the same day that he sent the letter and enclosures to Johnson, Holmes informed the dispatcher of that fact and asked for an assignment. The dispatcher replied, to quote Holmes' undenied and credible testimony, "No, we can't do that. Not until we get an O.K. or something similar to that from Michael Johnson."

Upon the return of the letter he had sent to Johnson, Holmes went to Pinkerton's and showed the returned letter and money order to Dispatcher Baxter. After inquiring from Holmes whether Holmes had seen Johnson about the matter, and receiving a negative reply, Baxter offered Holmes a part-time industrial job. Holmes refused to accept the assignment because it was less desirable and paid 30 cents per hour less than a water-front job.

Holmes received some few water-front assignments during August. These, however, were terminated on August 28. Thereafter, since Pinkerton's refusal to give Holmes any further water-front assignments. However, he requested and received some industrial assignments. These assignments were too objectionable to Holmes because of their long hours, their uncertainty, and their low wages. On November 15, when it became apparent to Holmes, because of the union-shop clause in the contract between Pinkerton's and the Organizing Committee, that he could not work as a water-front guard for Pinkerton's unless he was a member in good standing in the Organizing Committee, he returned to Pinkerton's his equipment.

2. The concluding findings

Since August 1, 1946, Pinkerton's has recognized Local 34 and, after the sequestration by the latter of the Pinkerton's water-front guards and patrolmen, it recognized the Organizing Committee as the exclusive collective bargaining representative of all its water-front guards and patrolmen.

The contract which was entered into on August 1, 1946, provides for a union shop on a 15-day basis and for a maintenance-of-membership. There is no contention that the contract was not valid when made, nor that the renewal thereof on June 15, 1947, was violative of any then existing legislation.

The issue involved herein turns on the questions whether, as a condition of continuous employment by Pinkerton's, (1) all its water-front guards and patrolmen hired after June 15, 1948, were required to become members of either Local 34 or the Organizing Committee, despite the 1947 amendments to the Act and (2) whether the said classified employees, once having taken out membership in either union, before or after said date, were required to maintain such membership in good standing.

Both of these questions must be resolved in the negative. The Congress in 1947, amended the Wagner Act so as to provide that no union-shop clause may validly be included in a collective bargaining contract unless and until a union security authorization election was held by the Board. No such election was held and none was requested. As the union-shop clause does not satisfy the conditions laid down

in the proviso of Section 8 (a) (3) of the Act,[11] the union-shop provision is therefore illegal, despite the automatic renewal in the contract.[12] Even if no action had been taken pursuant to that clause, the mere existence of such a provision acts as a restraint upon those desiring to refrain from union activities and membership, within the meaning of Section 7 of the Act. In the present proceeding affirmative action actually was taken by Pinkerton's and the Organizing Committee with respect to that clause and hence it must be found that Pinkerton's and the Organizing Committee were in accord in denying employment to Stenhouse on and after July 23, 1948, and in discharging Conners, Holmes, and Slater because each of them refused to remain members in good standing in the Organizing Committee.

Counsel for Pinkerton's and for the Organizing

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[11] This proviso provides:

* * * nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, * * * (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement. * * * (Emphasis supplied.)

[12] See Section 102 of the Act.

Committee contended at the hearing and in their respective briefs that the union-shop provision in the contract played no part in Pinkerton's determination not to give Stenhouse employment on and after July 23, 1948, and its refusal to assign to water-front jobs to Conners and Slater after August 7, 1948, and to Holmes after August 28, 1948, but maintained that such employment was refused to the four complainants, among other reasons, due to lack of work. These contentions are not supported by the record.

After a strike had been called by Johnson and in order to settle the strike Pinkerton's, on August 7, 1948, entered into the "Return to Work Agreement" which is set out at length above. That agreement is clearly repugnant to the Act and it was known by Pinkerton's to be so because at a meeting held prior to August 7, Pinkerton's attorneys stated to the representatives of the Organizing Committee that the union-shop provision of the 1946 agreement could no longer be enforced because of 1947 amendments to the Act. Furthermore, within a few days after the execution of the "Return to Work Agreement," Camden informed Johnson that the agreement was violative of the Act and therefore Pinkerton's could not, with impunity, carry out its terms.

The credible evidence clearly shows, moreover, as Pinkerton's counsel concedes in his brief, that Conners, Slater, and Holmes were removed from their respective jobs pursuant to an understanding reached at the time the "Return to Work Agree-

ment" was executed. Regarding this understanding, Camden testified, and the undersigned credits this position of Camden's testimony, as follows:

Q. On or about August 7, did you order that Mr. Conners, Mr. Slater, and Mr. Holmes be removed from employment on Marine Lynx? Did you ask that they be taken off the job? Did you give instructions that they be taken off the job.

A. I don't think that I specifically instructed that they be taken off, but it was definitely understood and I knew that they were to be taken off through our Patrol Superintendent at that time.

Trial Examiner Myers: It was understood between whom?

Mr. Magor: Between whom?

The Witness: Between myself and the Patrol Superintendent.

Trial Examiner Myers: What do you mean "understood"?

The Witness: Well, he was present at the time this return to work agreement was signed, and it was understood there and agreed that these men would be taken off the registered list.

Trial Examiner Myers: Understood and agreed between whom?

The Witness: Our Patrol Superintendent and myself, and Mr. Johnson was also present.

Admittedly, Conners, Slater, and Holmes were selected for lay-off because they were delinquent in dues to the Organizing Committee. Pinkerton's points to the fact that after Camden explained to Johnson, a few days after the execution of the

August 7 agreement, the illegality of the agreement and requested permission to reinstate Conners, Slater, and Holmes, Johnson said "Send [them] back to work" and thereafter the three above-named persons were offered employment by Pinkerton's. The credible evidence clearly shows, however, that Conners and Slater were not assigned to water-front work after August 7 and if any assignment to water-front jobs were made and refused by them, or either of them, such refusals were with the approval or suggestion of Camden. As for Holmes, it is true that he did receive some water-front assignments up to and including August 28, 1948, but since that date he has not been assigned to any such work.

Pinkerton's further contended that Conners, Slater, and Holmes would not have been assigned to water-front work during the course of the West Coast maritime strike, which commenced on September 2, 1948, because of a lessened need for guards on the water front. Pinkerton's records show, however, that a guard named Crank was dispatched by Pinkerton's to water-front work on August 14, 1948, and at the time of the hearing still was being dispatched to such work. Crank is listed on the seniority list, which list was prepared jointly by Pinkerton's and the Organizing Committee pursuant to the August 1, 1946, contract for the purpose of dispatching guards in order of their seniority, in position No. 123; while Holmes occupied position No. 56; Conners No. 89; and Slater No. 92. Thus, Pinkerton's own records refute its defense that Conners, Slater, and Holmes would not have

been assigned to water-front work during the course of the West Coast maritime strike, for each of them had more seniority than did Crank.

With respect to Stenhouse, the record clearly indicates, and the undersigned finds, that he was considered a Pinkerton's employee and paid by it until July 23, 1948, and that since that date he has not been assigned to any job by Pinkerton's. Its contention that at the time Stenhouse received his last pay check in the latter part of July, he agreed, because of "existing conditions" not to continue in Pinkerton's employ is without merit. No such agreement was made by Stenhouse. Besides, the "existing conditions" referred to by Camden in his conversation with Stenhouse on July 26, clearly meant the enforcement of the union-shop provision demanded by Johnson and not to the threatened coast-wide maritime strike which strike Camden testified he was referring to when he said "existing conditions." This finding is buttressed by the credible testimony of Stenhouse, who testified that Camden opened the meeting of July 26, by stating, "I just wanted to explain to you, Stenhouse, what the situation is. They are going to walk off the job if you walk on." The "they" referred to by Camden in the above quote, the record shows, referred to the members of the Organizing Committee and to no one else.

The credible evidence, coupled with the admission by counsel for Pinkerton's, clearly indicates that Conners, Slater, and Holmes were relieved of their respective assignments on August 7, 1948, upon the demand of the Organizing Committee. The strike in

August 1948, was called by Johnson and it was not called off until Pinkerton's agreed to do the bidding of the Organizing Committee and lay off the three-named persons. It thus follows that the "Return to Work Agreement" was entered into in order to escape the penalties that were implicit in the implied threat of the Organizing Committee. In other words, Pinkerton's entered into the 1948 agreement because it feared that by refusing to do so it would be visited with economic loss. As in the case of Stenhouse, Pinkerton's refused to assign him to any job for fear that to do so, the Organizing Committee would call a strike. The choice selected by Pinkerton's was without the pale of the law. Between the penalties attached to a disregard of the obligation imposed by the Act and the economic hardships that might develop from the threat of the Organizing Committee, Pinkerton's elected to bow to the latter and accept the former. Pinkerton's must therefore be directed to reverse its position to conform to the requirements of the law.

Pinkerton's and the Organizing Committee also contended at the hearing and in their respective briefs, that Holmes voluntarily quit on November 15, 1948. They point to the fact that he turned in his equipment that day with the announcement that he was quitting his job. It is uncontradicted that after August 7, Holmes was assigned to water-front work for a short period of time and his last assignment to such work was on August 28. After that date, Holmes was assigned, from time to time, to industrial work at less pay while Crank, an em-

ployee with less seniority, was assigned to the water front. Assignment of Holmes to industrial work, at a lower rate of pay than water-front work, is not substantially equivalent employment, within the meaning of the Act. The undersigned is of the opinion, and finds, that Holmes was discriminated against because of his failure to remain a member in good standing in the Organizing Committee, and thus was not assigned to water-front work, and that on November 15, 1948, he was constructively discharged by Pinkerton's and the Organizing Committee through their joint action.

Upon the entire record in the case, as epitomized above, the undersigned is convinced, and finds, that Conners and Slater were laid off on August 7, 1948, and thereafter refused water-front assignments because each of them was delinquent in their dues; that Holmes, for the same reason, was refused water-front assignments after August 28, 1948; that, for the same reason, Stenhouse was refused employment after July 23, 1948; that the Organizing Committee insisted that the four complainants be laid off and/or refused water-front assignments; and that neither Pinkerton's nor the Organizing Committee was protected in such activities by the union-shop provision of the August 1, 1946, contract or by the provisions of the "Return to Work Agreement" of August 7, 1948, under the proviso in Section 8 (a) (3) of the Act. The undersigned further finds that by such acts and by the other activities of Pinkerton's and the Organizing Committee, as summarized above, (1) Pinkerton's has discriminated

as to the hire and tenure of employment and as to the terms or conditions of employment of Stenhouse, Connors, Slater, and Holmes in order to encourage membership in the Organizing Committee, thereby interferring with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (a) (1) and (3) thereof; and (2) the Organizing Committee has caused Pinkerton's an employer, to discriminate against the four-named complainants herein in violation of Section 8 (a) (3) of the Act, thereby restraining and coercing the employees of Pinkerton's in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (b) (2) and 8 (b) (1) (A) thereof. The undersigned also finds that by Johnson's threats to the Pinkerton's employees, after June 15, 1948, that if they did not remain members in good standing in the Organizing Committee and pay dues to it, they would lose their jobs with Pinkerton's, the Organizing Committee violated Section 8 (b) (1) (A) of the Act.

3. The liability of the International for the unfair labor practices

The amended complaint alleged that the International and the Organizing Committee are jointly responsible for the unfair labor practices alleged. The latter organization is an affiliate of the former. Obviously, an international union cannot be charged ipso facto with violating the Act because one of its affiliates may have committed an unfair labor practice without some showing of participation therein

by the parent organization. The facts found under Section 1 and 2 above, show that the original agreement of August 1946, was executed by Johnson as an official of the International and that he executed the agreement as an official of the International on behalf of certain named affiliates. At the hearing and in his brief, the General Counsel, in support of his contention that the International should be found to have participated in the unfair labor practices found to have been committed by the Organizing Committee and hence a finding that the International violated the Act should be made, points to: (1) that Conners, on June 14, 1948, paid his dues to Johnson and received a receipt on the letterhead of the International and signed by Johnson as financial secretary; (2) that the letter addressed "To All Pinkerton's Employees," dated July 7, 1948, which letter is set out, in part, above was signed "Johnson Organizer"; that the "Return to Work Agreement" of August 7, 1948, was entered into by the International "on behalf of I.L.W.U. Contract Guards and Patrolmen" and Johnson was one of signatories thereto; and that Camden testified that all dealings with respect to the labor contracts covering Pinkerton's water-front guards and patrolmen were with "the same representatives of the Union that we started out with."

However, according to the credible and undenied testimony of Germain Bulcke, Bulcke succeeded Johnson as second vice president of the International on June 24, 1947; that thereafter and until about January 26, 1948, Johnson was an interna-

tional representative of the International; and that on the latter date Johnson ceased all official connection with the International and became an employee of the Organizing Committee. Since it has been found that no unfair labor practices had been committed prior to June 15, 1948, at which time Johnson was no longer an officer, representative, or an employee of the International, but was in the employ of the Organizing Committee, it follows that the International cannot be held responsible for the unfair labor practices committed by Johnson and the Organizing Committee and the undersigned so finds. The undersigned further finds that the evidence is insufficient to base a finding that the International violated the Act by the acts and statements of Johnson and the Organizing Committee, as found above, nor does the evidence show that the International participated in the unfair labor practices found herein to have been committed by the Organizing Committee. Accordingly, the undersigned will recommend that the allegations of the complaint with respect to the International be dismissed.

IV. The effect of the unfair labor practices upon commerce

The activities of Pinkerton's and the Organizing Committee set forth in Section III above, occurring in connection with the business operations of Pinkerton's, set forth in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and foreign countries, and such of them as have been found to be unfair labor practices tend to lead, and

have lead, to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that Pinkerton's and the Organizing Committee have engaged in unfair labor practices, the undersigned will recommend that they, and each of them, cease and desist therefrom and take the following affirmative action which the undersigned finds will effectuate the policies of the Act.

Since it has been found that the Organizing Committee induced Pinkerton's, (1) to discriminatorily refuse employment to Thomas W. Stenhouse on and after July 23, 1948, because he failed and refused to maintain membership in good standing in the Organizing Committee, (2) to discriminatorily discharge John T. Conners and Walter J. Slater on August 7, 1948, because each of them failed and refused to maintain membership in good standing in the Organizing Committee, and (3) to discriminatorily refuse water-front assignments to Charles O. Holmes on and after August 7, 1948, except on a few occasions between August 7 and 28, 1948, and constructively discharged Holmes on November 15, 1948, because he failed and refused to maintain membership in good standing in the Organizing Committee, the undersigned will recommend that Pinkerton's offer to Stenhouse immediate employment as a water-front guard, to which position he would have been assigned had he not been discrim-

inated against by Pinkerton's and the Organizing Committee, and to offer immediate and full reinstatement to Conners, Slater, and Holmes to their former or substantially equivalent positions[13] without prejudice to the seniority and other rights and privileges which the four complainants herein would have enjoyed had they not been discriminated against.

Since it has been found that by such discrimination, the Organizing Committee violated Section 8(b)(2) of the Act and Pinkerton's violated Section 8(a)(3) thereof, the undersigned will recommend that Pinkerton's and the Organizing Committee, jointly or severally, (1) make Stenhouse whole for any loss of pay he may have suffered by reason of such discrimination, by payment to him of a sum of money equal to the amount he normally would have earned as wages during the period from July 23, 1948, to the date of Pinkerton's offer of employment, less his net earnings,[14] during said period; (2) make Conners, Slater, and Holmes whole for any loss of pay they may have suffered by reason of such discrimination, by payment to each of them of a sum of money equal to the amount he normally would have earned as wages during the period from August 7, 1948, to the date of Pinkerton's offer of

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[13] See Matter of Chase National Bank, etc., 65 N.L.R.B. 827.

[14] See Matter of Crossett Lumber Company, 8 N.L.R.B. 440; Republic Steel Company v. N.L.R.B., 311 U.S. 7.

reinstatement, less his net earnings during said period.[15]

Since it has been found that the evidence does not support the allegations of the complaint that the International committed unfair labor practices, the undersigned will recommend that the allegations of the complaint with respect to the International be dismissed.

On the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

CONCLUSIONS OF LAW

1. Pinkerton's National Detective Agency, Inc., is engaged in commerce, within the meaning of Section 2 (6) and (7) of the Act.

2. International Longshoremen's and Warehousemen's Union, affiliated with the Congress of

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[15] Section 10 (c) of the Act provides that "back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination. * * *" While it is true that the unlawful pressure exerted by the Organizing Committee on Pinkerton's caused the latter to discriminate against the four complainants herein, there can be no question that Pinkerton's must bear the primary responsibility for the overt, discriminatory act, because, as employer, it alone had the power and authority to put it into effect. Pinkerton's, however, would not have committed the discriminatory act had it not been for the pressure exerted upon it by the Organizing Committee. Under the circumstances, both Pinkerton's and the Organizing Committee are responsible and should be jointly and severally liable for whatever back pay due the four complainants.

Industrial Organizations, and Contract Guard's and Patrolmen's Organizing Committee, affiliated with the International Longshoremen's and Warehousemen's Union, are labor organizations, within the meaning of Section 2 (5) of the Act.

3. By discriminating as to the hire and tenure of employment and as to the terms and conditions of employment of Thomas W. Stenhouse, John T. Conners, Walter J. Slater, and Charles O. Holmes, thereby encouraging membership in Contract Guard's and Patrolmen's Organizing Committee, Pinkerton's has engaged in, and is engaging in, unfair labor practices, within the meaning of Section 8(a)(3).

4. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, Pinkerton's has engaged in, and is engaging in, unfair labor practices, within the meaning of the Act.

5. By causing Pinkerton's to discriminate against four of its employees in violation of Section 8(a)(3) of the Act, thereby restraining and coercing the employees of Pinkerton's in the exercise of the rights guaranteed in Section 7 of the Act, Contract Guard's and Patrolmen's Organizing Committee, has violated Section 8(b)(2) and (b)(1)(A) of the Act.

6. By threatening, after June 15, 1948, the employees of Pinkerton's with loss of their jobs if they failed and refused to maintain membership in good standing in the Contract Guard's and Patrolmen's Organizing Committee, the Contract Guard's

and Patrolmen's Organizing Committee has violated Section 8(b)(1)(A) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

8. International Longshoremen's and Warehousemen's Union, affiliated with the Congress of Industrial Organizations, did not violate the Act as alleged in the complaint.

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law, the undersigned recommends:

1. Pinkerton's National Detective Agency, Inc., San Francisco, California, its officers, agents, successors, and assigns, shall:

(a) Cease and desist from encouraging membership in the Contract Guard's and Patrolmen's Organizing Committee, affiliated with Longshoremen's and Warehousemen's Union, or in any other labor organization of its employees, by discriminating in regard to their hire or tenure of employment, or as to the terms and conditions of their employment, thereby interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act;

(b) Giving effect to the union-shop provisions contained in its contract with Contract Guard's and Patrolmen's Organizing Committee dated August 1, 1946, and in the "Return to Work Agreement" dated August 7, 1948, or to any extension, renewal, modification or supplement thereto, or to any super-

seding contract which might interfere with, restrain, or coerce its employees in the exercise of the rights guaranteed in Section 7 of the Act;

(c) Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(1) Offer immediate employment as a water-front guard to Thomas W. Stenhouse without prejudice to whatever seniority and other right and privileges he may have acquired had he been employed by Pinkerton's on and after July 23, 1948;

(2) Offer to John T. Conners, Walter J. Slater, and Charles O. Holmes immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority and other rights and privileges in the manner set forth in "The remedy";

(3) Post in its offices in San Francisco, California, copies of the notice attached hereto and marked Appendix A. Copies of the notice to be furnished by the Regional Director for the Twentieth Region, after being duly signed by Pinkerton's representative, shall be posted by Pinkerton's immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places including all places where notices to its water-front guards, patrolmen, and other employees are customarily posted. Reasonable steps shall be taken by Pinkerton's to insure that said notices are not altered, defaced, or covered by any other material;

(4) Notify the Regional Director for the Twen-

tieth Region in writing within twenty (20) days from the date of the receipt of this Intermediate Report, what steps Pinkerton's has taken to comply therewith.

2. Contract Guard's and Patrolmen's Organizing Committee, affiliated with International Longshoremen's and Warehousemen's Union, which in turn is affiliated with the Congress of Industrial Organizations, its officers, representatives, and agents shall:

(a) Cease and desist from causing or attempting to cause Pinkerton's National Detective Agency, Inc., or any other employer, to discriminate against its employees in violation of Section 8(a)(3) of the Act, thereby restraining and coercing said employees in the exercise of the rights guaranteed in Section 7 of the Act;

(b) Take the following affirmative action which the undersigned finds will effectuate the policies of the Act;

(1) Post at its offices in San Francisco, California, copies of the notice attached hereto and marked Appendix B. Copies of the notice to be furnished by the Regional Director for the Twentieth Region, after being duly signed by a duly authorized representative of the Organizing Committee, shall be posted by the Organizing Committee immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to its water-front guards and patrolmen members are customarily posted. Reasonable steps shall be taken by the Organizing Committee to insure

that said notices are not altered, defaced, or covered by any other material. Post, or offer to post, similar signed copies of said notice in conspicuous places in the San Francisco, California, offices of Pinkerton's;

(2) Notify the Regional Director for the Twentieth Region in writing, within twenty (20) days from the date of the receipt of the Intermediate Report, what steps it has taken to comply therewith.

3. Pinkerton's National Detective Agency, Inc., its officers, agents, successors, and assigns and Guard's and Patrolmen's Organizing Committee, affiliated with the International Longshoremen's and Warehousemen's Union, its officers, representatives, and agents, jointly and severally make whole Thomas W. Stenhouse, John T. Conners, Walter J. Slater, and Charles O. Holmes for any loss of pay they may have suffered because of the discrimination against them, by payment to each of them of a sum of money in the manner set forth in "The remedy."

It is further recommended that unless on or before twenty (20) days from the receipt of this Intermediate Report, Pinkerton's and the Organizing Committee notified said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring Pinkerton's and the Organizing Committee to take the action aforesaid.

It is further recommended that the complaint with respect to International Longshoremen's and

Warehousemen's Union be dismissed.

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board —Series 5, as amended August 18, 1948, any party may, within twenty (20) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations, filed with the Board, Washington 25, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report and Recommended Order or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a brief in support of the Intermediate Report and Recommended Order. Immediately upon the filing of such statement of exceptions and/or briefs, the party filing the same shall serve a copy thereof upon each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon and shall be legibly printed or mimeographed, and if mimeographed shall be double spaced. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46 should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days

from the date of service of the order transferring the case to the Board.

In the event no Statement of Exceptions is filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations, and recommended order herein contained shall, as provided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

Dated at Washington, D. C., this 18th day of May, 1949.

/s/ HOWARD MYERS,
Trial Examiner

APPENDIX A

Notice to All Employees Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not interfered with, restrain, or coerce our employees in the exercise of their rights guaranteed in Section 7 of the Act, by discriminating in regard to their hire or tenure of employment, or any term or condition of employment, to encourage membership in any labor organization.

We Will Offer to John T. Conners, Walter J.

Slater, and Charles O. Holmes immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination.

We Will Offer immediate employment as a waterfront guard to Thomas W. Stenhouse and make him whole for any loss of pay as a result of the discrimination in refusing to hire him on and after July 23, 1948.

All our employees are free to become or remain members of any labor organization. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any labor organization.

Pinkerton's National Detective Agency, Inc.
(Employer)

By ..... (Representative)

Dated.....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

To All Officers, Representatives, Agents, and Members of Contract Guard's and Patrolmen's Organizing Committee, Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not cause, or attempt to cause, Pinkerton's National Detective Agency, Inc., or any other employer, to discriminate in any manner against its employees, in violation of Section 8(a)(3) of the aforesaid Act.

We Will Make Thomas W. Stenhouse, John T. Conners, Walter J. Slater, and Charles O. Holmes whole for any loss of pay suffered as a result of discrimination.

Contract Guard's and Patrolmen's Organizing Committee, affiliated with International Longshoremen's and Warehousemen's Union, which in turn is affiliated with Congress of Industrial Organizations.

By ..... (Representative)

Date.....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Affidavits of Service by Mail attached.

[Title of Board and Cause.]

EXCEPTIONS OF PINKERTON'S NATIONAL DETECTIVE AGENCY TO INTERMEDIATE REPORT AND RECOMMENDED ORDER

Pinkerton's National Detective Agency sets forth its exceptions to the Intermediate Report and Recommended Order as follows:

1. The Intermediate Report erroneously recommends that Pinkerton's be held liable for back pay to Conners, Slater and Holmes from August 7, 1948 to the date of Pinkerton's offer of reinstatement, notwithstanding the uncontradicted testimony of Pinkerton's, the testimony of Conners, Slater and Holmes themselves, and the Trial Examiner's own findings (P. 15 1.5 that they were unconditionally offered employment by Pinkerton's on or about August 11, 1948.

An employer is not liable for back pay after an unconditional offer of employment if the job is refused, even if the employer thereupon offers to secure other work for the employee.

2. In view of the specific findings that the union demand*ed* caused, and induced the employer to discriminate against the complainants, the Recommended Order that the employer and the union "jointly and severally make whole the complainants for any loss of pay suffered" is contrary to the statute (Sec. 10 C), which specifically provides that

only the union shall be liable where it is responsible for the discrimination.

ROTH AND BAHRS,
/s/ By GEORGE O. BAHRS,
Attorneys for Pinkerton's National Detective Agency, Inc.

Received June 21, 1949. N.L.R.B.

[Title of Board and Cause.]

EXCEPTIONS TO INTERMEDIATE REPORT

Comes now Contract Guard's and Patrolmen's Organizing Committee, I.L.W.U., and, pursuant to the rules and regulations of the National Labor Relations Board, as amended, files this, its Exceptions to the Intermediate Report of the Trial Examiner entered in the above-entitled matter on the 18th day of May, 1949.

This respondent excepts to so much of the said Intermediate Report as is indicated below.

I.

Page 3, line 24, beginning with the words "Full opportunity" to page 3, line 27, ending with the words "all parties".

II.

Page 5, line 18, beginning with the words "The sections" to page 5, line 55, ending with the words "go to work".

III.

Page 6, line 9, beginning with the words "Sometime in December" to page 6, line 15, ending with the words "several renewals thereof."

IV.

Page 6, line 31, beginning with the words "According to the credited testimony" to page 6, line 45, ending with the words "since that date."

V.

Page 6, line 46, beginning with the words "Under date of July 7" to page 7, line 5, ending with the words "in two years."

VI.

Page 7, line 6, beginning with the words "On July 19", to page 7, line 28, ending with the words "from Pinkerton's."

VII.

Page 8, line 27, beginning with the words "Stenhouse appeared", to page 8, line 43, ending with the words "with the facts."

VIII.

Page 8, line 45, beginning with the words "During the first week of August" to page 10, line 2, ending with the words "delinquent in their dues."

IX.

Page 12, line 25, beginning with the words "Slater testified" to page 12, line 43, ending with the words "with him later."

X.

Page 12, line 50, beginning with the words "Around the middle of August", to page 12, line 58, ending with the words "and talk to you."

XI.

Page 13, line 1, beginning with the words, "In the latter part of August" to page 13, line 11, ending with the words "30 cents per hour less."

XII.

Page 13, line 20, beginning with the words "Holmes testified" to page 13, line 26, ending with the words "your name is on the list."

XIII.

Page 13, line 48, beginning with the words "Holmes received" to page 13, line 58, ending with the word "equipment."

XIV.

Page 14, line 11, beginning with the words "The issue involved" to page 14, line 36, ending with the words "the Organizing Committee."

XV.

Page 14, line 45, specifically the words "These contentions are not supported by the record."

XVI.

Page 15, line 55, beginning with the words "The credible" to page 15, line 61, ending with the words "any such work."

XVII.

Page 16, line 1, beginning with the word "Pinkerton's" to page 16, line 15, ending with the word "Crank".

XVIII.

Page 16, line 17, beginning with the words "With respect to" to page 16, line 33, ending with the words "no one else."

XIX.

Page 16, line 35, beginning with the words "The credible evidence" to page 16, line 54, ending with the words "requirements of the law."

XX.

Page 16, line 55, beginning with the word "Pinkerton's" to page 17, line 8, ending with the words "joint action."

XXI.

Page 17, line 10, beginning with the words "Upon the entire record" to page 17, line 38, ending with the words "of the Act."

XXII.

Page 18, line 32, beginning with the words "The activities" to page 18, line 37, ending with the words "of commerce."

XXIII.

Page 18, line 41, beginning with the words "Having found" to page 18, line 59, ending with the words "Organizing Committee."

XXIV.

Page 18, line 62, the words "and the Organizing Committee."

XXV.

Page 19, line 7, beginning with the words "Since it has been found" to page 19, line 20, ending with the words "during said period."

XXVI.

Page 19, line 46, beginning with the words "Section 10 (c)" to page 19, line 59, ending with the words "the four complainants."

XXVII.

Page 20, line 13, beginning with the words "By causing Pinkerton's" to page 20, line 28, ending with the words "of the Act."

XXVIII.

Page 21, line 30, beginning with the words "Contract Guard's" to page 21, line 60, ending with the words "to comply therewith."

XXIX.

Page 21, line 63, beginning with the words "and Guard's" to page 21, line 65, ending with the words "and agents."

XXX.

Page 22, lines 5 and 6, the words "and the Organizing Committee."

Dated: June 24th, 1949.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,

/s/ By NORMAN LEONARD,

Attorneys for Contract Guard's and Patrolmen's Organizing Committee, I.L.W.U.

United States of America
Before The National Labor Relations Board

Case No. 20-CA-120

In the Matter of
PINKERTON'S NATIONAL DETECTIVE AGENCY, INC.,

and

THOMAS W. STENHOUSE, JOHN T. CONNERS, WALTER J. SLATER and CHARLES O. HOLMES, individuals.

Case No. 20-CB-33

In the Matter of

CONTRACT GUARD'S AND PATROLMEN'S ORGANIZING COMMITTEE, I.L.W.U., and INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, C.I.O.,

and

JOHN T. CONNERS, CHARLES O. HOLMES, and WALTER J. SLATER, individuals.

DECISION AND ORDER

On May 18, 1949, Trial Examiner Howard Myers issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents, Pinkerton's National Detective Agency, Inc., referred to herein as Pinkerton's, and Contract Guard's and Patrolmen's Organizing Committee, I.L.W.U., referred to herein as Organizing Committee, had en-

gaged in and were engaging in certain unfair labor practices, and recommending that they cease and desist therefrom, and take certain affirmative action. In his Intermediate Report the Trial Examiner also found that Respondent, International Longshoremen's and Warehousemen's Union, C.I.O., had not engaged in certain unfair labor practices, and recommended that the complaint with respect to it be dismissed. A copy of the Intermediate Report is attached hereto.[1] Thereafter, Respondents Pinkerton's and Organizing Committee filed exceptions to the Intermediate Report and supporting briefs. The Respondents' request for oral argument is hereby denied because the record, the exceptions and briefs, in our opinion, adequately present the issues and the positions of the parties.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs filed by the Respondents, and the entire record in the case and hereby adopts the Trial Examiner's findings of fact, except as corrected and amplified in this opinion, and his conclusions and recommenda-

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[1] Pursuant to Sec. 203.33(b) of the National Labor Relations Board Rules and Regulations, Series 5 as amended, these cases were consolidated by order of the Regional Director for the Twentieth Region (San Francisco, California) on November 30, 1948.

tions not inconsistent with our conclusions and order, hereinafter set forth.[2]

1. The Trial Examiner found that the Organizing Committee induced Pinkerton's discriminatorily to refuse employment to Thomas W. Stenhouse on and after July 23, 1948, because he failed and refused to maintain membership in good standing in the Organizing Committee. Stenhouse was first discharged by Pinkerton's in March 1948, for failure to maintain membership in the Organizing Committee, under the union-security agreement between Pinkerton's and the Organizing Committee which was then valid. Camden, the manager of Pinkerton's San Francisco office, offered Stenhouse re-employment in July 1948, but never actually assigned him to work although he was given a few days' pay. There is no evidence in the record that the Organizing Committee ever knew of Camden's offer to re-employ Stenhouse, nor that it induced Camden specifically to refuse Stenhouse any work assignments. The complaint does not allege that the Organizing Committee was responsible for Stenhouse's discharge in July, at which time the union-security agreement was invalid, and we are not warranted

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[2] Because no exceptions were taken to the Trial Examiner's findings that Respondent International Longshoremen's and Warehousemen's Union, C.I.O., was not responsible for the unfair labor practices committed by the Organizing Committee, and had not itself violated the Act by participating in those unfair labor practices, we shall accept his findings. In so doing, however, we do not pass on their correctness.

in going beyond the complaint to find, on the record as it exists, that the Organizing Committee violated Section 8(b)(2) by inducing Pinkerton's to discharge Stenhouse. We do, however, adopt the Trial Examiner's conclusion that Pinkerton's refused employment to Stenhouse after July 23, 1948, because of his failure to maintain good standing in the Organizing Committee.

2. We are in accord with the Trial Examiner that Conners and Slater were laid off on August 7, 1948, because each of them was delinquent in his dues to the Organizing Committee. We do not however agree that Conners and Slater were justified in refusing to accept the waterfront assignments offered them for the night of August 11. The record does not disclose why Conners and Slater both requested that they be permitted to carry guns on this particular assignment, although they had previously worked on the docks at night unarmed. If they were fearful of what they described as "existing conditions," presumably referring to their lack of good standing in the Union, they failed to make it clear that they considered themselves threatened with physical violence by anyone connected with the Union. We regard Camden's offer to relieve them of their assignments as a recognition on his part that they were unwilling to accept the jobs, and that Pinkerton's would therefore have to arrange for other guards to replace them.

We are not convinced that either Pinkerton's or the Organizing Committee discriminated against Conners or Slater during the period between Au-

gust 11 and September 16, 1948. We do not rely, however, in reaching this conclusion, on the conversation of August 9 or 10, between Camden and Johnson, business representative of the Organizing Committee, wherein Johnson told Camden "to send them back to work," referring to the guards who had been dismissed for nonpayment of dues. Neither party to this conversation advised the discharged guards that the policy of the Respondents was henceforward to be one of nondiscrimination. On the contrary, Camden, when he later spoke to Conners and Slater, rather than allaying their fears, as he might have done by reporting a change in Johnson's attitude, encouraged them in their refusals of the assignments for August 11, by agreeing that "existing conditions" were bad. But even this unexplained lack of frankness on Camden's part does not excuse Conners and Slater in turning down the offer of an assignment. We may not conjecture on whether or not Pinkerton's would have given them further waterfront assignments if they had accepted this first assignment following their dismissal. Their refusal, without adequate cause, of this assignment relieved Pinkerton's, for a time, of its obligation to continue to offer them assignments.

Pinkerton's again offered Conners and Slater waterfront assignments for September 16, 1948, but conditioned the offers on their obtaining clearances from Johnson of the Organizing Committee. The clearances were needed to pass them through the picket lines established by the International Longshoremen's and Warehousemen's Union and other

maritime unions then engaged in the general waterfront strike in the San Francisco Bay area, which lasted from September 2 into December 1948. It is clear from Johnson's behavior when Conners and Slater went to see him, and from his phone conversation the next day with a Pinkerton's supervisor, that Johnson was determined not to grant clearances to anyone who was not in good standing with the Organizing Committee, despite the fact that the Organizing Committee was not itself on strike. Whether this was a policy of Johnson in his capacity as a representative of the Organizing Committee, or as a representative pro tem of the joint strike committee, which had been set up by the striking unions, one of which was the Organizing Committee's parent body, the ILWU, is beside the point. The fact remains that Pinkerton's accepted the dictation of an outside party as to who could work for it on the waterfront, and the conditions under which they would be permitted to work. The imposition on Conners and Slater of the condition that they obtain a clearance from Johnson before they could be allowed to work was illegal. Pinkerton's discriminatory treatment of Conners and Slater did not end merely because it took the action it did from fear of the consequences that might result if it opposed the demand of the Organizing Committee to enforce its illegal union-security agreement. We find that Pinkerton's offer to Conners and Slater of waterfront assignments for September 16, if they could get clearances from Johnson, discriminated against them in a manner proscribed

by Section 8(a)(3), and that by Johnson's imposition of the requirement that dues be paid up before Conners and Slater could obtain clearances, the Organizing Committee violated Section 8(b)(2).

On October 4, 1948, Pinkerton's captain of the guards called Slater to offer him a job at a construction project which was scheduled to last from 6 months to a year, and would pay him a higher hourly rate than he had been receiving as a waterfront guard. Slater said he was working elsewhere, and would not accept the assignment. We find that this constituted refusal of an assignment which was at least the equivalent of those Slater had been receiving before August 1948. By turning it down, Slater indicated his intention to sever all his remaining connections with Pinkerton's. We shall not order Pinkerton's to offer reinstatement as a waterfront guard to Slater, nor require Pinkerton's or the Organizing Committee to make him whole for any loss of pay he may have suffered after October 4, 1948.

3. The Trial Examiner found that the Organizing Committee induced Pinkerton's discriminatorily to refuse waterfront assignments to Holmes on and after August 7, 1948, except on a few occasions between August 7 and August 28, and that Pinkerton's had constructively discharged him on November 15, because he had failed and refused to maintain membership in good standing in the Organizing Committee. We agree. In addition to the reasons stated by the Trial Examiner for his findings we also rely on the following facts to establish that the dis-

crimination against Holmes did not cease when Johnson of the Organizing Committee told Camden on August 9 or 10 to send the nondue-paying employees back to work:

(a) Under the Pacific Coast Working and Dispatching Rules which were incorporated into the Pinkerton's contract, Holmes was entitled as a matter of right to be reassigned to steady work on the SS Marine Lynx.[3] But despite a shortage of guards, which we infer from the fact that Pinkerton's called Holmes back to work twice during his vacation, and despite Holmes' favorable position on the seniority register, he was neither given his regular assignment on the SS Marine Lynx, nor did Pinkerton's advise him that its discriminatory action had ceased, and that he would be given waterfront assignments as frequently as in the past.

(b) The seniority list jointly prepared by the Organizing Committee and Pinkerton's after the August strike of the Organizing Committee, is dated November 30, 1948, which was during the San Francisco general waterfront strike. It lists the names of 12 waterfront guards hired after September 2, 1948, the date the general waterfront strike began, and during a time when, Pinkerton's contends, employment opportunities for its waterfront guards had been sharply reduced. The hiring of new guards during this period was inconsistent with Pinkerton's contention that Holmes received no water-

[3] The rules provided that a guard dispatched to a ship when it first came into port was entitled to remain working there until the ship was moved.

front assignments after August 28 because there was no work available for him.

(c) Finally we rely, as an additional reason for our finding, on the statement made to Holmes by a Pinkerton dispatcher a month after he left Pinkerton's employ that he could have his waterfront job with Pinkerton's if he would "square" himself with the Union.

The Respondents contend that Holmes was not constructively discharged on August 7, because he accepted 4 waterfront assignments after that date and then voluntarily quit on November 15. However, we regard Pinkerton's action on August 7, in removing Holmes from his regular assignment on the SS Marine Lynx, and its stated reason for that action, as a notice, which cannot be disregarded, that Pinkerton's considered Holmes' normal employment relationship with it to have been terminated. Pinkerton's offer, and Holmes' acceptance, of further waterfront and industrial assignments did not restore Holmes to the status quo, to the position on the seniority register he had occupied. By accepting every assignment he was offered, Holmes, as distinguished from Conners and Slater, indicated that he wanted to resume his former status as a waterfront guard, without qualifications or conditions, and with the same expectation of continued regular employment that he had formerly enjoyed. Pinkerton's contention that Holmes received no waterfront assignments after the general waterfront strike began because there was no work available, is not persuasive. Pinkerton's admits that even

during the strike its detail of waterfront guards averaged 55 daily. Holmes was No. 56 on the seniority register in effect at that time. Despite the fact that there must have been some days when Pinkerton's hired more than 55 guards for waterfront duty, and that all the first 55 men on the register could not have worked every day during the strike, Holmes was never called. Furthermore, Pinkerton's found it necessary to hire 12 new guards during the strike, for waterfront assignments. Nor do we regard Holmes' decision on November 15 to sever all association with Pinkerton's as negating the validity of our conclusion that he had been constructively discharged. When he turned in his equipment on November 15, Holmes finally accepted the situation as it had existed from August 7, that he could not expect restoration to his former position unless he became a member in good standing of the Organizing Committee.

4. The Trial Examiner found that the Organizing Committee violated Section 8 (b) (1) (A) by causing Pinkerton's to discriminate against Stenhouse,[4] Conners, Slater, and Holmes, and by threatening Pinkerton employees, after June 15, 1948, with loss of their jobs if they failed to maintain membership in the Organizing Committee.

Section 8(b)(1)(A) provides:

It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce

[4] See Paragraph 1, supra.

(a) employees in the exercise of the rights guaranteed in Section 7 * * *.[5]

We find that the following actions of the Organizing Committee or its agents constitute specific violations of Section 8(b)(1)(A):

(a) Johnson's letter of July 7. The pertinent paragraphs of this letter, which was sent to all Pinkerton guards, are as follows:

To all Pinkerton Guards:

In order to dispel some of the confusion among the membership, I am writing each member regarding the following.

1. The coastwide agreement between the ILWU-CIO and the Pinkerton agency has been extended until June 15, 1949, by mutual agreement between the Company and the Union, and all of its terms and conditions are in effect and full force until that date. Anyone who tells you any different is just a plain liar and is only doing so to break down your union—the Union that raised your wages $4 a day in 2 years.

3. The membership voted unanimously that the fines for being delinquent in dues be enforced. Starting July 9, these fines will be in effect and delin-

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[5] Section 7 provides in part:

Employees shall have the right to form, join or assist labor organizations * * * and shall also have the right to refrain, from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

quents will be dealt with according to the agreement.

5. It has come to the attention of the officers and the Executive Board that some members have been misled into signing cards with the phony independent union and also were misled by Sgt. Fox who was playing along with said renegade union and who was fired by Pinkerton for doing so. These members should straighten up and fly right and help build this union, otherwise they will be cited before the Executive Board.

We are satisfied that the letter was calculated to coerce the Pinkerton guards to retain their membership in the Organizing Committee because it contains an express threat of reprisal for failure to pay union dues.

(b) Nonpayment of union dues, Slater testified without contradiction that some time between July 20 and 25, Johnson telephoned him and said, "Unless you get over here and pay some dues, you are not going to work." "I'll give you to Thursday to get over here and pay them dues, or you don't work." A threat to an employee that he will not work if he does not join a union or pay union dues, absent an authorized union-security agreement, is coercive, and we have uniformly so held.[6]

(c) The strike of the Organizing Committee against Pinkerton's. The strike which lasted for 2 or

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[6] Smith Cabinet Manufacturing Co., Inc., 81 NLRB 886; Seamprufe Incorporated, 82 NLRB 892.

3 days, early in August, was primarily to compel Conners, Slater, Holmes, and other employees who were not members in good standing in the Organizing Committee, to forego the rights which Section 7 protects. Its purpose is evidenced by the "Return to Work Agreement" executed at its conclusion, and by the fact that Pinkerton's dispatchers told Conners, Slater, and Holmes, that they could no longer work because their names appeared on Johnson's list of delinquent union members which had been prepared in accordance with the "Return to Work Agreement." The threat by a union to strike an Employer's plant, and thereby force him to discharge an employee in accordance with an illegal union-security provision of a contract, has recently been held to be directed primarily to compel other employees to forego the right guaranteed to them by Section 7 of refusing to join a union.[7] If a threat to strike for that purpose is a violation of Section 8(b)(1)(A), it is clear that an actual strike for the same objective is also a violation of that section.

We conclude, therefore, that by sending the July 7 letter to the Pinkerton guards, by Johnson's threat to Slater in July, and by striking to compel Pinkerton's to discharge Conners, Slater, and Holmes, the Organizing Committee coerced the Pinkerton waterfront guards in the exercise of their rights guaranteed under Section 7, and thereby violated Section 8(b)(1)(A) of the amended Act.

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[7] Clara-Val Packing Company, 87 NLRB No. 120. (Member Reynolds dissented, but considers himself bound by the decision therein.)

5. Respondent Pinkerton argues that where a violation of Section 8(b)(2) has been established, restitution of back pay by the Employer is not a necessary consequence of an order for reinstatement, because, although an order for reinstatement can be directed only against the Employer, the Act makes the party responsible for the discrimination liable for back pay. Pinkerton's further argues that both the Employer and the Union may be subject to an order to cease and desist discrimination, but that, if the Union has caused the Employer to discriminate, it is equivalent to saying that it was the Union which was responsible for the discrimination. Respondent Organizing Committee argues that if any back pay award is proper at all, it should be only for the 2 or 3 days immediately following the strike of the Organizing Committee against Pinkerton, and should cease as of the date Johnson told Camden to send the delinquent union members back to work.

We do not believe that either Respondent ceased discriminating against Conners, Slater, and Holmes as a result of Johnson's statement to Camden that the Organizing Committee had no objection to their going back to work. Although we have found that Conners and Slater unjustifiably refused an offer of a single night's work on August 10, we rely for our conclusion on the facts that neither Respondent advised these three guards of its alleged change of position as to their right to future employment; on the Respondent's failure to abrogate the illegal preferential employment clause in the "Return to Work

Agreement'';[8] on the illegal union-security clause of the contract; and, finally on the Respondents' joint failure to restore these three guards to their positions on the seniority register.

The failure of either Respondent unmistakably to declare to the discriminatees, in action or statement, that its discriminatory treatment would cease, is sufficient reason for our order to both Respondents to assume a joint and several liability for the loss of pay incurred by Conners, Slater, and Holmes.[9]

The Remedy

Having found that the Respondents engaged in unfair labor practices, we shall order them to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

We shall order Pinkerton's to offer Stenhouse, Conners, and Holmes immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to make Thomas W. Stenhouse whole for the loss of pay suffered by reason of its discrimination against him.

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[8] A preferential hiring clause of this sort goes beyond the type of union-security provision which may be validated under the Act by a union-authorization election. Morely Manufacturing Company, 83 NLRB No. 60; Hawley and Hoops, Inc., 83 NLRB No. 50.

[9] H. Milton Newman, 85 NLRB No. 132; Clara-Val Packing Company, 87 NLRB No. 120; Union Starch & Refining Company, 87 NLRB No. 137.

As we have found that both Pinkerton's and the Organizing Committee are responsible for the discrimination suffered by Conners, Slater, and Holmes, we shall order the Respondents jointly and severally to make these employees whole for the loss of pay they may have suffered by reason of the discrimination against them, by payment to each of a sum of money equal to the amount that he normally would have earned as wages during the periods specified in Section 3 of our Order, and ending with the date of the offer of reinstatement or, as to Slater, to October 4, 1948, less their net earnings during such periods. It would, however, be inequitable to the Organizing Committee to permit the amount of its liability for back pay to increase despite the possibility of its willingness to cease its past discrimination, in the event that Pinkerton's should fail promptly to offer reinstatement to those entitled to it under our Order. We shall therefore provide that the Organizing Committee may terminate its liability for further accrual of back pay to Conners and Holmes, or either of them, by notifying Pinkerton's in writing that it has no objection to their reinstatement. The Organizing Committee shall not thereafter be liable for any back pay accruing after 5 days from the giving of such notice. Absent such notification, the Organizing Committee shall remain jointly and severally liable with Pinkerton's for all back pay to Conners and Holmes that may accrue until Pinkerton's complies with our order to offer them reinstatement.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

1. The Respondent, Pinkerton's National Detective Agency, Inc., San Francisco, California, its officers, agents, successors, and assigns shall:

(a) Cease and desist from:

(1) Encouraging membership in Contract Guards and Patrolmen's Organizing Committee, ILWU, or in any other labor organization of its employees, by discharging any of its employees or discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of their employment;

(2) In any other manner interfering with, restraining, or coercing its employees in the right to refrain from exercising the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

(b) Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Offer to Thomas W. Stenhouse, John T. Conners, and Charles O. Holmes immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges;

(2) Make whole Thomas W. Stenhouse for any loss of pay he may have suffered by reason of its discrimination against him, by payment to him of a sum of money equal to the amount he normally would have earned as wages from July 28, 1949, to the date of its offer of reinstatement, less his net earnings during said period;

(3) Post at its offices in the San Francisco, California, Bay area, copies of the notice attached hereto as Appendix A.[10] Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by the Respondent Company's representative, be posted by it immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to waterfront guards are customarily posted. Reasonable steps shall be taken by the Respondent Company to insure that such notices are not altered, defaced, or covered by any other material;

(4) Notify the Regional Director for the Twentieth Region in writing, within ten (10) days from the date of this Decision and Order, what steps it has taken to comply herewith.

2. The Respondent, Contract Guards and Patrolmen's Organizing Committee, ILWU, its officers,

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[10] In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words: "A Decision and Order" the words: "A Decree of the United States Court of Appeals Enforcing."

representatives, and agents, or the officers, representatives, and agents of its successors, shall:

(a) Cease and desist from:

(1) Requiring, instructing, or inducing Pinkerton's National Detective Agency, Inc., its agents, successors, or assigns, to lay off employees because they are not members in good standing in Contract Guards and Patrolmen's Organizing Committee, ILWU, or its successors, except in accordance with Section 8(a)(3) of the Act;

(2) Directing, instigating, or encouraging employees to engage in a strike, or approving or ratifying strike action taken by employees for the purpose of requiring, except in accordance with Section 8(a)(3) of the Act, that Pinkerton's National Detective Agency, Inc., its agents, successors, or assigns, lay off or otherwise discriminate against employees, or applicants for employment, because they are not members in good standing of Contract Guards and Patrolmen's Organizing Committee, ILWU, or its successors;

(3) In any other manner causing or attempting to cause Pinkerton's National Detective Agency, Inc., or its agents, successors, or assigns, to discriminate against its employees in violation of Section 8(a)(3) of the Act;

(4) Restraining or coercing employees of Pinkerton's National Detective Agency, Inc., its successors or assigns, in the exercise of their right to refrain from any or all of the concerted activities guaranteed by Section 7 of the Act.

(b) Take the following affirmative action, which

the Board finds will effectuate the policies of the Act:

(1) Post in conspicuous places in its business offices in the San Francisco, California, Bay area, where notices to members are customarily posted, copies of the notice attached hereto as Appendix B.[11] Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by official representatives of Contract Guards and Patrolmen's Organizing Committee, ILWU, or its successors, be posted by it immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to insure that such notices are not altered, defaced, or covered by any other material;

(2) Mail to the Regional Director for the Twentieth Region signed copies of the notice attached hereto as Appendix B, for posting, the employer willing, in the offices of Pinkerton's National Detective Agency, Inc., in the San Francisco Bay area, in places where notices to employees are customarily posted. Copies of said notice to be furnished by the Regional Director for the Twentieth Region, shall, after being signed as provided in paragraph 2(b)(1)

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[11] In the event this Order is enforced by a decree of the United States Court of Appeals, there shall be inserted before the words: "A Decision and Order," the words: "A Decree of the United States Court of Appeals Enforcing."

of this Order, be forthwith returned to the Regional Director for said posting;

(3) Notify the Regional Director for the Twentieth Region, in writing, within ten (10) days from the date of this Order, what steps it has taken to comply therewith.

3. Pinkerton's National Detective Agency, Inc., its officers, agents, successors, and assigns, and Contract Guards and Patrolmen's Organizing Committee, ILWU, its officers, representatives, and agents, or its successors, and the officers, representatives, and agents of its successors shall, jointly and severally, make whole John T. Conners, Walter J. Slater, and Charles O. Holmes for any loss of pay they may have suffered because of the discrimination against them, by payment to each of them individually of a sum of money equal to the amount they normally would have earned as wages for the period beginning August 7, 1948, the date each was discriminatorily laid off:

Conners—to August 10, 1948; and from September 16, 1948, to the date of Respondent Pinkerton's offer of reinstatement, less his net earnings during said period;

Slater—to August 10, 1948; and from September 16 to October 4, 1948, less his net earnings during said period;

Holmes—to the date of Respondent Pinkerton's offer of reinstatement, less his net earnings during said period.

The liability of the Organizing Committee for any additional payments to Conners and Holmes that may arise because of Pinkerton's failure to offer them reinstatement after the date of this Order, may be tolled by the Organizing Committee notifying Pinkerton's in writing that it has no objection to the reinstatement of Conners and Holmes, as set forth in the section entitled "The Remedy" herein.

Signed at Washington, D. C., this 9th day of June, 1950.

PAUL M. HERZOG,
Chairman

JOHN M. HOUSTON,
Member

JAMES J. REYNOLDS, Jr.,
Member

ABE MURDOCK,
Member

[Seal] National Labor Relations Board

[Printer's Note: Appendix A and B are duplicates of Appendix A and B set out at pages 68-70 of this printed record.]

Before The National Labor Relations Board
Twentieth Region

Case No. 20-CA-120

In the Matter of:

PINKERTON'S NATIONAL DETECTIVE AGENCY, INC.,

and

THOMAS W. STENHOUSE, et al.,

Case No. 20-CB-33

In the Matter of:

CONTRACT GUARDS AND PATROLMEN'S ORGANIZING COMMITTEE, I.L.W.U., et al.,

and

JOHN T. CONNERS, et al.,

Hearing Room 634, Pacific Bldg., 631 Market St., San Francisco, Calif., Tuesday, March 29, 1949

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock a.m.

Before:

Howard Myers, Esq., Trial Examiner. [1*]

Appearances:

Robert V. Magor, appearing on behalf of the General Counsel, National Labor Relations Board.

Gladstein, Andersen, Resner and Sawyer, by Norman Leonard, Esq., appearing on behalf of the Contract Guards and Patrolmen's Organizing Committee, I.L.W.U.

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* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Appearances (Continued):

Gladstein, Andersen, Resner and Sawyer, by Norman Leonard, Esq., appearing on behalf of the International Longshoremen's and Warehousemen's Union, C.I.O.

Roth and Bahrs, by George O. Bahrs, Esq., appearing on behalf of Pinkerton's National Detective Agency, Inc. [2] * * *

Trial Examiner Myers: Very well, gentlemen. Will the General Counsel please call his first witness?

Mr. Magor: I would call the Trial Examiner's attention to the fact that the answer filed on behalf of the respondent unions in this case deny the allegations of commerce of the company, whereas the answer filed on behalf [35] of the respondent company admitted the allegations of commerce in this proceedings. I wonder if we might reach a stipulation on the part of the parties of that admission on the part of the respondent unions that the allegation of facts as stated therein are true and correct?

Mr. Leonard: Well, the denials were based upon a lack of information and belief. And we still don't have that information. But, we are not—we are prepared to enter into any stipulation of fact that the company recites the facts were. So, we are prepared to enter into a stipulation concerning them. We just had no information to answer, consequently we deny on that ground.

Mr. Bahrs: Well, the allegations you are referring to, Mr. Magor, are paragraphs one, two and three of the amended complaint?

Mr. Magor: That's right.

Mr. Bahrs: Well, there is no denial of the allegations of those paragraphs of the complaint. And we are willing to stipulate that these are the facts.

Trial Examiner Myers: And do you further stipulate that during all the times material to the issues of this proceeding, that the percentages referred to in paragraph three of the complaint are applicable?

Mr. Bahrs: Well now—well, I don't think that we are in a position to stipulate that at all times involved here [36] that eighty-five percent of the income of the company for its services in this area was received for services to operate as of ships, but so far as we are concerned, there is no question but what it was a very substantial sum, and that it was a very substantial percentage of its income. We are not making any point that the activities of the company—its operations in this region does not affect interstate commerce. There is no effect to that.

Trial Examiner Myers: Very well. Is it accepted?

Mr. Magor: That is accepted, and stipulated by the General Counsel.

Trial Examiner Myers: Is that acceptable to you, Mr. Leonard?

Mr. Leonard: Yes. [37]

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J. L. CAMDEN,

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name, sir?

The Witness: J. L. Camden.

(Testimony of J. L. Camden)

Trial Examiner Myers: Will you spell your last name for the record?

The Witness: C-a-m-d-e-n.

Trial Examiner Myers: Where do you live, Mr. Camden?

The Witness: San Francisco, 2156 Clipper Street.

Trial Examiner Myers: You may be seated. The general counsel may proceed with the examination of this witness.

Q. (By Mr. Magor): Are you the general manager of Pinkerton's National Detective Agency, Mr. Camden?

A. I am Assistant General Manager and entitled Regional Manager in the Western Region; west coast.

Trial Examiner Myers: What territory does the west coast region of Pinkerton's National Detective Agency consist?

The Witness: The western states, those bordering the Pacific Coast; Washington, Oregon and California. [40]

Q. (By Mr. Magor): How long have you held that position, Mr. Camden?

A. Since January 1943.

Q. And your chief function of your company is to furnish guard protection service to companies, is that correct?

A. That is part of our services, that is correct. We also furnish——

Q. Pardon me?

A. ——other types of service too.

Q. How many guards do you normally employe?

(Testimony of J. L. Camden)

A. You mean for our entire western region?

Q. Yes sir.

A. Well, that fluctuates. Probably from 300 to five or six hundred.

Q. And did you, in the course of conduct of your business, enter into any contract with a labor organization representation of your guards?

A. We did, yes sir.

Q. And when was your first contract signed with that labor organization?

A. As I recall, it was in August, 1946.

Q. I will show you, Mr. Camden, an agreement between the International Longshoremen and Warehousemen's Union and Pinkerton's National Detective Agency, effective date of August 1st, 1946, signed by J. L. Camden for the Pinkerton's [41] National Detective Agency, and ask you if that is a true copy of the agreement?

A. That is the true copy of the agreement, yes sir.

Q. Were you present during negotiations of this agreement, Mr. Camden? A. Yes sir.

Q. And as I refer your attention to page 12 of the agreement, it was signed for the International Longshoremen and Warehousemen's Union by Michael P. Johnson? A. Yes sir.

Q. Is that correct. Now was there also, referring to page 12, Mr. Camden, it states that this agreement shall remain in full force and effect until June 15th, 1947 and shall be renewed from year to year thereafter, unless either party give notice in writing of its desire to modify or terminate this agreement not less than sixty days prior to June

(Testimony of J. L. Camden)

15th, 1947. Now, was any notice given either on the part of the company or the union sixty days prior to June 15th, 1947, Mr. Camden? A. No sir.

Q. And did you consider this contract in full force and effect after that?

Mr. Leonard: Objected to as calling for his opinion and conclusion; being incompetent, irrelevent and immaterial. The contract speaks for itself.

Trial Examiner Myers: I will sustain the objection. [42] Reframe your question.

Q. (By Mr. Magor): After that date did you negotiate with the International Longshoremen and Warehousemen's Union for and on behalf of your employees, pursuant to the agreement entered into in August the 1st, 1946? A. (Pause.)

Trial Examiner Myers: You understand the question?

The Witness: Will you repeat it, please?

Mr. Magor: All right.

Trial Examiner Myers: All right. Will the reporter please read the question.

(Question read)

Mr. Leonard: That question is ambiguous. You mean after June 15th, 1947?

Mr. Magor: After June 15th, 1947.

Mr. Bahrs: You understand the question, Mr. Camden?

The Witness: Well, I think I do.

Trial Examiner Myers: Well, maybe you better reframe the question now.

Q. (By Mr. Magor): After June 15, 1947, did you

(Testimony of J. L. Camden)

deal with the International Longshoremen and Warehousemen's Union on behalf of your employees?

Mr. Leonard: Objected to on the grounds it is incompetent, irrelevant and immaterial.

Trial Examiner Myers: Overruled. [43]

A. Well, throughout the lifetime of the contract there was dealings with the Union.

Q. (By Mr. Magor): Then after June 15th you continued to deal with the Union, is that correct?

A. Continuously, yes sir.

Q. I see.

Trial Examiner Myers: Up to the present time?

The Witness: Up to the present time.

Q. (By Mr. Magor): I will refer your attention, Mr. Camden, to Page 13 of the agreement, Pacific Coast Working Rules and Dispatching Rules, wherein Number 1 states, "Dispatching shall be done from the employer's office by telephone. The regular dispatching hours to be cited by the Port Labor Regulations Committee." Now, was that the normal way in which a man was dispatched to a job? A. That was the normal way.

Q. That was the normal way. I will refer your attention to Number 4 of the same page, 13, Pacific Coast Working and Dispatching Rules, which reads, "Registered men dispatched to a ship shall not be replaced when the ship is in the same port area. This does not apply in taking of a day off and"—and ask you if that is the normal procedure during that course of time?

(Testimony of J. L. Camden)

A. I'd say that was the normal procedure. There might have been changes in it. [44]

Q. Now, in June 15th, 1948, Mr. Camden, was—or sixty days prior thereto, was this contract reopened? A. It was not.

Q. It was not. Were there any negotiations entered into between you, on behalf of the company, with the union?

Mr. Leonard: Before June 15th?

Mr. Bahrs: Excuse me. What time was this?

Mr. Magor: Sixty days prior to June 15th, 1948, Mr. Camden?

Trial Examiner Myers: '47, you mean?

Mr. Mayor: '48. A. (Pause.)

Trial Examiner Myers: Do you understand the question, Mr. Camden? Put it this way; maybe this will shorten it. Now, you entered into this agreement in August 1946 and by its terms was to run to June, 1947, is that right?

The Witness: Yes, sir.

Trial Examiner Myers: Now, regarding the contract, there is an automatic renewal clause unless certain matters took place, isn't that right?

The Witness: (Pause.)

Trial Examiner Myers: The contract would automatically renew itself unless either party wanted the contract reopened in June, 1947?

The Witness: That is correct.]45]

Trial Examiner Myers: Now, it started back in August, 1947. Will you tell us all what negotiations you had with the union respecting the renewal of this contract?

(Testimony of J. L. Camden)

Mr. Leonard: May I have——

Trial Examiner Myers: If any?

Mr. Leonard: May I have an objection to that question?

Trial Examiner Myers: All right. I will withdraw it. I thought may be I could clean it up quickly. Go ahead, Mr. Magor.

Q. (By Mr. Magor): I will rephrase the question for you, Mr. Camden. Now, the contract, I take it you considered in full force and effect after June 15th, 1947, wasn't reopened?

A. That's right.

Q. And concluded for another year in June 15th, 1948, was there sixty days prior thereto, was there any reopening by and on behalf of the company or the union of the contract? A. There was not.

Q. There was not. Did you consider the contract in full force and effect after that date?

Mr. Leonard: Objected to as calling for his legal opinion and conclusion. The contract speaks for itself.

Trial Examiner Myers: Overruled. You may answer.

The Witness: Will you read the question?

(Question read.)

A. That is after June 15th, 1948? [46]

Q. (By Mr. Magor): That is correct, Mr. Camden.

A. We did, to this extent. Sometime, either prior to or after June 15th, I presume it was after June 15th, our attorneys advised us that the provisions of the contract providing for a closed shop was not

(Testimony of J. L. Camden)

binding. That was sometime in the latter part of June, as I recall. [47] * * * * *

Q. Now, you say that after—sometime after July 15th, 1948, your attorneys advised you that the closed shop provisions of this contract was illegal. Now, did you have any dealings with the union after that? Did they attempt to renegotiate the contract?

A. Well, in the early part of August—August the 5th or 6th.

Q. Of what year? A. '48.

Q. Did you meet with the union at that time?

A. I did.

Q. Who was the representative for the union, Mr. Camden?

A. Mr. Johnson was the representative of the union, and there were—— [48]

Q. Can you tell me what Mr. Johnson's position was in the union; what he held himself out to you as?

Trial Examiner Myers: Mr. Leonard, can you stipulate what Mr. Johnson's first name and——

Mr. Leonard: Michael P. Maybe I can help you on the other, although I don't think it is—it is immaterial. Mr. Johnson informs me in August of 1948 he was an organizer and business agent for the Contract Guards and Patrolmen's Organizing Committee, is that right?

Mr. Michael P. Johnson: That is correct.

Trial Examiner Myers: Is that stipulation acceptable, General Counsel?

Q. (By Mr. Magor): That stipulation is not acceptable to General Counsel.

Trial Examiner Myers: All right.

(Testimony of J. L. Camden)

Q. (By Mr. Magor): What did Mr. Johnson hold himself out to you to be, Mr. Camden?

A. That was my understanding, that he was the business agent of the union representing our guards.

Q. I notice here, Mr. Camden, that this original agreement entered into was signed by the International Longshoremen and Warehousemen's Union. Now, was that the union that was representative of your employees, the Guards——

Mr. Leonard: Objected to——

Q (By Mr. Magor): —during the course of the agreement? [49]

Mr. Leonard: Objected to as incompetent, irrelevant and immaterial and calling for his opinion and conclusion, and he misstates the cause. The agreement reads that the ILWU was acting on behalf of its various local signatories hereto, that is the preface of the agreement. Why don't you be fair?

Trial Examiner Myers: Well, I think the agreement speaks for itself. That is, the agreement should speak for itself. * * * * *

Q. Didn't the Contract Guards and Organizing committee represent the employees after a certain date?

A. I understand they did, but I don't know yet what difference there is, because all of our relations, so far as we have been concerned, have been with the CIO, and with the——

Q. With the International, is that correct?

Mr. Leonard: Well, now, just a minute, I object to that as leading and suggestive.

(Testimony of J. L. Camden)

Trial Examiner Myers: Well, wait. Let him——

Mr. Magor: This is an adverse witness.

Trial Examiner Myers: Wait a minute, Mr. Magor. Please let the witness answer. Will you finish your answer, please?

A. Well, throughout the period of our relationship with [50] the union, Mr. Johnson was the representative with whom we dealt. Now, to me he represented the CIO, and—of the individual local. Our group—I didn't have any specific knowledge whether that was the ILWU or an organizing committee. I wouldn't know.

Q. (By Mr. Magor): I see, Mr. Camden, thank you. Isn't it true, Mr. Camden, that on or about August the 6th, there was a strike called against the Pinkerton's National Detective Agency?

Mr. Leonard: Objected to as incompetent, irrelevant and immaterial and outside the scope of the issues framed by the pleadings. There is nothing in the pleadings that has to do with such a matter.

Trial Examiner Myers: What year? August 1st of what year?

Mr. Magor: 1948.

Trial Examiner Myers: Motion denied. Objection overruled. Will you read the question to the witness?

(Question read.)

A. There was, yes.

Q. (By Mr. Magor): Now, who were you dealing with when the strike took place; what union?

A. The union represented here in our agreement.

(Testimony of J. L. Camden)

Q. The International Longshoremen and Warehousemen's Union?

Mr. Leonard: Objected to as leading and suggestive, [51] and he is misstating the contract.

(Thereupon the document referred to was marked General Counsel's Exhibit No. 2 and received in evidence.) [52]

GENERAL COUNSEL'S EXHIBIT No. 2

AGREEMENT

Between International Longshoremen's and Warehousemen's Union on behalf of Local 6 (Stockton), Local 26 (Long Beach, Wilmington, San Pedro Area), Local 34 (San Francisco Bay Area), Local 40 (Portland, Columbia River Area), and Pinkerton's National Detective Agency, Inc.

Effective August 1, 1946

Agreement

This Agreement, entered into this 1st day of August, 1946, between the International Longshoremen's & Warehousemen's Union, acting in behalf of its various Locals signatory hereto, hereinafter referred to as the Union, and the Pinkerton's National Detective Agency, Inc., hereinafter referred to as the Employer, and shall become effective upon approval of the Government agencies involved.

Witnesseth:

Section I. Recognition:

The Employer recognizes the Union as the sole collective bargaining agent for its employees, including all persons employed as guards and patrolmen at waterfront installations, docks, piers, terminals, warehouses, and aboard vessels, and warehouses and production plants.

Section II. Union Shop:

It is understood in hiring to fill all vacancies or new positions, the Employer will, under this Agreement, choose his own source of new employees. The Employer agrees to notify the Union of such employment. New employees so hired under and subject to this Contract shall join the Union within fifteen (15) days of the date of their employment.

The Employer agrees to terminate within forty-eight (48) hours the employment of any employee who becomes delinquent and in bad standing with the Union.

* * * * *

Section XXIV. Term of Agreement:

This Agreement shall remain in full force and effect until June 15, 1947, and shall be renewed from year to year thereafter unless either party shall give notice in writing of its desire to modify or terminate this Agreement not less than sixty (60) days prior to June 15, 1947. Negotiations for modification or amendment of this Agreement shall com-

mence within ten (10) days of receipt of such written notice.

For the Union:
International Longshoremen's & Warehousemen's Union,
/s/ Michael P. Johnson
Kathleen Griffin, Local 34
(San Francisco Bay Area)
E. M. Balatti,
Local 6 (Stockton)
H. W. Hanks, Local 40
(Portland, Columbia River Area)
Louis Sherman, Local 26 (Long Beach, Wilmington, San Pedro Area)
For the Employer:
Pinkerton's National Detective Agency, Inc.,
/s/ By J. O. Camden

Pacific Coast Working and Dispatching Rules

1. Dispatching shall be done from the Employer's office by telephone at regular dispatching hours to be decided by the Port Labor Relations Committees.

2. Registered men shall be dispatched according to low hours and work shall be equalized over each one month period.

3. Men shall carry monthly work cards to be provided by the Union. Hours worked shall be certified to by a representative of the Employer and

cards shall be turned in to the Union office at the end of each month.

4. Registered men when dispatched to a ship shall not be replaced while the ship is in the same port area. This does not preclude the taking of a day off which shall not be deemed a replacement under this ruling.

5. Preference of employment on steady jobs shall be given according to seniority.

6. Men shall be permitted to rotate shifts upon request and no registered man shall be required to remain on one shift for more than 30 days if he requests a change.

7. On completion of a job of eight (8) or more consecutive hours in any one period, men shall have a rest period of not less than eight (8) hours before resuming work or being dispatched to another job provided that other men are available.

Q. Now, did you meet with the Union on August the 7th? A. I did.

Q. And who were you meeting with at that time?

A. Mr. Johnson and there were two or three additional members of the executive committee, or some other committee, of the Watchmen's Union, I don't have their names.

Trial Examiner Myers: When did you meet with them?

A. On the afternoon of August the 7th?

Q. (By Mr. Magor): What took place at this meet, Mr. Camden?

(Testimony of J. L. Camden)

A. A United States conciliator of labor was present. The previous meetings had been——

Trial Examiner Myers: Well, just tell us about this meeting of August 7th, 1948?

A. Well, at this meeting, I first conferred with the United States Conciliator of Labor—he brought me up to date on the grievances that had been raised. And then we met in a group with Mr. Johnson and the other representatives of the union, and as a result of that meeting a return to work agreement was prepared, of which——

Mr. Magor: Now—pardon me.

The Witness: You have a copy which you subpoenaed. [54]

* * * * *

Q. (By Mr. Magor): Prior to this meeting, Mr. Camden, had you attended any other conferences with the union, within the period from July 15th, 1948 to the 6th or 7th of August, 1948?

A. We had a meeting in our attorney's office. Whether it was prior to July the 15th or after, I cannot say.

Q. And who was present at that meeting?

A. Mr. George Bahrs, Mr. Johnson and an attorney from the CIO accompanied Mr. Johnson. I am not positive of his name, I believe it was Mr. Gladstein, but that is, I am not sure of that.

Q. Now, was that meeting in July 1948?

A. I am not positive that it was.

Trial Examiner Myers: Well, was it——

The Witness: It was some time after June 15th.

(Testimony of J. L. Camden)

Q. (By Mr. Magor): Let me put it this way; was it—[58] some time after June 15th, you say?

A. Yes.

Q. Was it prior to the normal expiration date of the contract?

A. No. As I recall it was after June the 15th.

Trial Examiner Myers: Some time after June 15th, and before August 7th, 1948?

The Witness: Yes. Of that I am not positive, it was within that period of time some time.

Trial Examiner Myers: You are positive of that?

The Witness: Yes, sir.

Trial Examiner Myers: You are positive of that?

The Witness: Yes.

Q. (By Mr. Magor): Now, could you tell me what was discussed at this meeting; did you say anything, or what did Mr. Johnson say; what was the purpose of the meeting?

A. Well, the primary purpose of the meeting was there, the question of enforcement of the closed shop.

Q. Did you object to the enforcement of the closed shop?

A. Our attorneys position was that it was a violation of the law.

Q. I take it that was Mr. Bahr's position at that time? A. Mr. Bahr's and Mr. Roth's.

Trial Examiner Myers: Mr. Who?

The Witness: Mr. Roth of that firm.

(Testimony of J. L. Camden)

Trial Examiner Myers: That is the firm of Roth and Bahr? [59]

The Witness: Yes, sir.

Q. (By Mr. Magor): At this meeting, did the union attorneys insist upon a closed shop?

* * * * *

A. They did.

Trial Examiner Myers: What did they say with respect thereto?

The Witness: As I recall now, their interpretation was that the provisions of the contract were binding, that the contract was automatically renewed, that all provisions of it were in [60] effect and binding.

Trial Examiner Myers: Go ahead, Mr. Magor.

Q. (By Mr. Magor): Was there any mention made of the fact that non-union men were being dispatched the same as union men at this meeting?

A. Not to my knowledge.

Q. Mr. Camden, I have here in my hand a document which was furnished by you, which purports to be registered list between the Contract Guards and Patrolmen, I. L. W. U., C.I.O. Is this a list that is furnished to the company?

A. Well, my understanding is, this list is prepared by the company, I mean, it would be typed by the company.

Q. Typed by the company?

A. Typed by the company and with the mutual understanding of a representative of the union and of our organization.

(Testimony of J. L. Camden)

Q. And during the course of the agreement—then this list is dated June 28th, 1948—during the course of the agreement this would be prepared by the Port Labor Relations Committee, of which Capt. Girard was a representative for the company, is that correct? A. That is correct, sir.

Q. And Michael Johnson was a representative for the union? A. Yes sir.

Q. And I see here the list is the date on which each employee came into service in the company, is that correct? [61] A. That is correct, yes, sir.

Q. Were the seniority dates in order of seniority? A. That's right.

Q. And the number opposite that, 1, 2, 3, would be the order of seniority, is that correct?

A. That would be—yes.

Q. At this time I propose to offer this document in evidence as General Counsel's Exhibit 3 in this matter, and request leave to withdraw it to have additional copies made.

Trial Examiner Myers: Well, show it to counsel, please—have you seen this before, Mr. Leonard?

Mr. Leonard: No, sir.

Trial Examiner Myers: Are there any objections to that paper going into evidence?

Mr. Leonard: May I ask the witness a couple of questions on voir dire with respect to it, as soon as Mr. Bahrs is finished examining it?

Trial Examiner Myers: Certainly. Go ahead.

Voir Dire Examination

Q. (By Mr. Leonard): Mr. Camden, I would

(Testimony of J. L. Camden)

like to ask you a couple of questions about this list, which Mr. Magor is offering. If I understand it, you say that list is prepared in your office, is that correct; original?

A. That is my understanding, yes, sir.

Q. Huh? A. Yes. [62]

Q. And then it is submitted, or at least the practice at that time was, it was submitted to the union for corrections or confirmation on the union's part, is that right?

A. Well, my understanding is this, that from time to time the list would be revised to men resigning or for some other reason, and additional men would be added, and when that was done it was agreed upon by the representative of the union and our patrol superintendent, and then the revised copy would be copied but it would be agreed to before being copied. Now, I may be in error on that, but that is my understanding of how it was handled.

Q. Now, with respect to that actual document that is before you, those four or five typewritten sheets, do you know whether that represents the revised copy after the union had an opportunity to check it, or was that the one that was prepared by the company and submitted to the union for check?

A. Well, as I stated before, my understanding is that they were always agreed upon with the union representatives before the revised copy would be retyped. In other words, you have—each—our agency and the union had a copy and during whatever period would elapse, there was no period when this

(Testimony of J. L. Camden)

revision was to be made, that if additional names were to be added, it would be through mutual agreement with the union that they be written out in longhand or some other way and then incorporated in the typed copy. [63]

Q. You don't know of your own knowledge whether that list, which is actually physically before you, was examined and approved by the union, do you? A. I do not.

Q. You don't. Does that list purport to represent all of the so called waterfront guards and not the uptown guards?

A. Just the waterfront guards.

Q. Just the waterfront guards. Now, just, for example now, this man No. 8, Cerruti, C-e-r-r-u-t-i, do you know whether or not he is a waterfront guard or uptown guard? A. I wouldn't know.

Q. You don't? A. No.

Q. It is your understanding that this list represents only the waterfront guards and you don't know of your own knowledge whether it was approved and gone over by the union, is that correct?

A. No. I know to my own knowledge whether this specific one was or not, but I know that was the understanding and plan and the program that was carried out over a period of two year's time.

Mr. Leonard: We have an objection on the ground that no foundation has been laid to show that the union had anything to do with that list.

Trial Examiner Myers: The objection is overruled and I [64] will receive the paper in evidence

and I will ask the reporter to please mark it as General Counsel's Exhibit No. 3.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 3, in evidence.) [65]

GENERAL COUNSEL'S EXHIBIT No. 3

CONTRACT GUARDS AND PATROLMEN—ILWU—CIO
Registered List—June 28, 1948

1.	7/ 2/25	Plathner, F. A., 74 Sixth St., SF
2.	1/ 3/39	Barry, N. P., 108 Wawona St., SF
3.	5/22/40	Hyland, T. F., 1371 23rd Ave., SF
4.	7/ 2/40	Duncan, F. F., 2365 Durant Ave., Pak.
5.	4/ 9/42	Davis, W. W., 742 Excelsior Ave., SF
6.	5/13/42	Evans, O. H., 6 Gaiser Court, SF
7.	6/ 2/42	Plumb, F. M., 902 Divisadero, SF
8.	2/ 1/43	Cerruti, P., 1599 10th Ave., SF
9.	6/ 3/43	Wagner, H., 414 Lake St., SF
10.	9/ 2/43	Mills, E. W., 669 Shrader St., SF
11.	11/ 1/43	Brooks, W. J., 805 22nd St., SF
12.	11/23/43	Schmierer, D., 1178 Eddy St., SF
13.	3/ 1/44	Sayers, T. P., 2150 32nd Ave., SF
14.	3/ 6/44	Graves, G. S., 226 Byxbee St., SF
15.	5/16/44	Bolhov, A. V., 1732 Lyons St., SF
16.	6/21/44	Bourda, J. A., 1732 Lyons St., SF
17.	7/14/44	Anderson, W. A., 412 Eighth St., Oak.
18.	7/14/44	Clark, F. B., 165 Crescent Ave., SF
19.	9/20/44	Costa, J. A., 1108 Jefferson, SL
20.	10/ 3/44	Du Mez, H., 1278 Market St., SF
21.	1/ 9/45	Brown, G. W., 121 Stanyan St., SF
22.	2/ 6/45	Feleciano, M., 2360 Waverly St.
23.	3/14/45	Fontaine, W. A., 616 Haight St., SF
24.	5/14/45	Townley, A. J., 123 Liberty St., SF
25.	5/31/45	Mergen, Michael, 218 Haight St., SF
26.	9/ 6/45	Patrick, J. A., 192 East Vista, Daly City
27.	9/ 7/45	Welsh, J. R., 415 Divisadero St., SF
28.	9/ 7/45	Tucker, G. H., 1461 Alice St., Oak.
29.	9/26/45	Betts, R. F., 991 Valencia St., SF
30.	10/11/45	McElroy, O. L., 3068 San Bruno Ave., SF
31.	10/15/45	Strong, C. P., 6 Octavia St., SF

General Counsel's Exhibit No. 3—(Continued)

32.	10/19/45	Tindira, M. J., Room 215, 380 Eddy St., SF
33.	10/22/45	Allen, C. D., 635 Page St., SF
34.	11/20/45	Reed, R. E., 864 Page St., SF
35.	12/12/45	Rees, E., 2495 Sutter St., SF
36.	2/18/46	Edgett, H., 206 Garden Lane, Colma
37.	3/18/46	Woodson, T. E., 1039 Mission, SF
38.	2/19/46	Hoffman, M., 115 A Sanchez St.
39.	3/ 4/46	James, B. D., 1039 Mission St., SF
40.	3/12/46	Robinson, A. C., Rm. 86, 412 Eight St., Oak.
41.	3/18/46	Wilkins, J. E., 2241-A Market St., SF
42.	3/18/46	Lundell, H. A., 707 26th Ave., SF
43.	3/25/46	Collins, Z., 516 O'Farrell St., SF
44.	3/25/46	Shorter, J. L., 15-A Henry St., SF
45.	3/25/46	Woodward, R. E. 4157½ Broadway, Oak.
46.	4/26/46	Nelli, J. P., 2522 34th Ave., SF
47.	4/26/46	Parcell, W. J., 971 Mission St., SF
48.	4/27/46	Evon, E. J., 148 Shrader St., SF
49.	5/ 3/46	Mills, W. S., 2531 24th St., SF
50.	5/ 7/46	Chilgren, C. B., 865 47th Ave., SF
51.	5/ 7/46	Livingston, L. C., 1901 Potrero Ave., Rich.
52.	6/ 8/46	Nielsen, C. A., 447 Eddy St., SF
53.	6/ 8/46	Schechter, B., 351 Turk St., SF
54.	6/11/46	Schmitz, B., 700 Washington, Albany
55.	6/13/46	Miller, H. H., 360 Arlington St., SF
56.	6/13/46	Holmes, C. O., 412 Eighth St., SF
57.	6/18/46	Kirk, W. N., 175 Sixth St., SF
58.	6/20/46	Cushing, E. E., 3220 16th St., SF
59.	6/26/46	Hagen, R. O., 424 S. 24th St., Rich.
60.	7/ 1/46	Lyons, B. J., 6 Octavia St., SF
61.	7/ 9/46	Drejes, C., 1350 Vermont St., SF
62.	7/15/46	Hohl, A., 363 Collingwood, SF
63.	7/30/46	Bradshaw, J. W., 507 Bush St., SF
64.	8/ 9/46	Samuels, S., 469 Pine St., SF
65.	8/12/46	Damski, G. H., 1278 Market St., SF
66.	8/15/46	Owens, Wm., 539 Powell St., SF
67.	8/16/46	Reynolds, H. F., 920 Powell St., SF
68.	8/16/46	Kerr, Phil W., 44 Third St., SF
69.	8/19/46	Mchugh, M., 3178 Washington St., SF
70.	8/19/46	Alden, A. C., 54 Fourth St., SF
71.	8/19/46	Bahnsen, H. H., 139 Fourth St., SF
72.	8/19/46	Cominoli, H. H., 542 Bush St., SF

General Counsel's Exhibit No. 3—(Continued)

73.	8/19/46	Farris, S. L., 1248½ So. Van Ness, SF
74.	8/21/46	Kimble, H. P., 286 Second St., SF
75.	8/22/46	Fortner, W. L., 435 Duboce St., SF
76.	8/22/46	Morrison, C. D., 605 Jones St., SF
77.	8/23/46	Campbell, J., 621 59th St., Oak.
78.	8/27/46	Hall, L. J., 117 Fourth St., SF
79.	8/29/46	Alperin, S., 1531 Sutter St., SF
80.	9/ 2/46	Pires, A., 354 Coleridge St., SF
81.	9/ 9/46	Mahoney, J., 667 McAlister St., SF
82.	8/10/46	Fahey, W. B., 1214 Polk St., SF
83.	9/12/46	Prevot, W. U., 8 Dodge St., SF
84.	9/12/46	Smith, E. P., 1767 Page St., SF
85.	9/14/46	Carlson, J. F. 297 S. Ridge Rd., SF
86.	9/14/46	Strode, R. B., 1814 Pacific Ave., Ala.
87.	9/17/46	Laska, M., 43 Guam Rd., Bldg. 86, SF
88.	9/18/46	Abena, F. J., 1080 66th St., Oak.
89.	9/23/46	Conners, J. T., 7107 Holly St., Oak.
90.	9/24/46	Jackson, H. R., 15 Vintage Ct., Rich.
91.	9/27/46	Harper, T. M., 87 Third St., SF
92.	9/30/46	Slater, W. J., 1800 Rose St., Berk.
93.	9/31/46	McCarthy, J., 50 Church St., SF
94.	10/ 2/46	Mendia, A. E., 400 Duboce Ave., SF
95.	10/ 5/46	Hilliard, F. E. C., 684 Folsom St., SF
96.	10/ 8/46	Fischer, W., 145 Ney St., SF
97.	10/11/46	Johnson, L. L., 1217 San Bruno Ave., SF
98.	10/22/46	Dadisman, F. S., 916 Kearny St., SF
99.	10/25/46	Jauch, H. N., 709 Shotwell St., SF
100.	11/ 5/46	Silacci, T. P., 55 Fifth St., SF
101.	12/ 2/46	Anderson, D. H., 458 Castro St., SF
102.	12/10/46	Browning, H., 4350 Taft St., SF
103.	12/17/46	Murray, J. E., 1420 E. 21st St., Oak.
104.	1/ 6/47	Jones, A. W., 1149-A Ellis St., SF
105.	2/25/47	Turner, S. J., 3330 Kirkham St., SF
106.	3/12/47	Davis, T. E., 591 Haight St., SF
107.	3/12/47	Duvall, Vincent, 547-A Second Ave., SF
108.	5/27/47	Loebl, D., 179 Jessie St., SF
109.	6/10/47	Probst, E. C., 1625 Fifth Ave., Oak.
110.	7/10/47	McNeil, N. C., 1347 Eddy St.
111.	7/27/47	Curry, E. J., 447 Eddy St., SF, Hotel Lark
112.	7/28/47	Cook, C. O., 1171 Valencia St., SF
113.	7/28/47	Shotts, H. B., 150 Shrader St., SF

General Counsel's Exhibit No. 3—(Continued)

114.	8/ 4/47	Eckman, A., 566 Callan Ave., SF
115.	9/12/47	Mosquera, R., 737 McAlister St., SF
116.	10/ 2/47	Gerton, A., 8907 Hillside Ave., Oak.
117.	10/10/47	Noble, H. R., 1929 15th St., SF
118.	10/14/47	Page, H. H., 1171 De Haro St., SF
119.	10/29/47	Hax, L. W., 1401 14th Ave., SF
120.	10/13/47	Selden, R. M., 420 Fairmount Ave., Oak.
121.	10/31/47	Millar, J. F., 1382 21st Ave., SF
122.	10/31/47	Oller, E. M., 1182 Vallejo St., SF
123.	11/ 5/47	Crank, R. M., 32 S. Meeker St., Rich.
124.	11/24/47	Peek, A., 531 Diamond St., SF
125.	11/25/47	Kujawa, P., 12 Dodge St., SF
126.	11/25/47	Taylor, J. C., 885 McAlister St., SF
127.	12/ 1/47	Parks, H., 2307 Taylor St., SF
128.	12/ 9/47	Baker, R. W., 1122 Ellis St., SF
129.	12/10/47	Foelsing, H. H., 949 Teresita Blvd., SF
130.	12/16/47	Summers, W. L., 1197 McAlister St., SF
131.	12/30/47	Baker, L. J., 242 Turk St., SF
132.	1/14/48	Crowley, E. W., 1558 Grove St., SF
133.	1/15/48	Van Dewater, K. A., 3852 Geary St., SF
134.	1/15/48	Perchert, A., 1021 Everett St., El Cerrito
135.	1/15/48	Lockard, F. W., 1343 51st Ave., Oak.
136.	1/21/48	Tyler, F. M., 1621 Bissell, Rich.
137.	1/28/48	Eckerson, C. J., 1500 Sutter St., SF
138.	1/28/48	Henderson, T. M., 405 Cherry St., SF
139.	1/29/48	McConnell, F. P., 1453 Post St., SF
140.	2/16/48	Murray, F. P., 2703 Panhandle, Rich.
141.	2/16/48	Asturbel, Manuel, 849 70th Ave., Oak.
142.	3/ 1/48	Menke, R. E., 1526 Diamond St., SF
143.	3/31/48	Manis, Sherlock, 2844 California, SF
144.	4/ 1/48	Blake, Wm., 964 Howard St., SF
145.	4/ 6/48	Blake, William, 964 Howard St., SF
146.	4/ 6/48	Petrequin, Gaynor, 938 Buchanan, Albany
147.	4/16/48	Seaton, G. W., 107 Redwood Ave., Corte Madera
148.	4/22/48	Stegall, F. W., 1772 Church St., SF
149.	4/22/48	Creegan, Patrick, 159 Russ Street, SF
150.	4/22/48	Cooper, J. C., 351 Turk St., SF
151.	4/23/48	Tracy, Walter, 26 11th St., Rich.
152.	4/28/48	Cremminger, H. G., 327 San Carlos St., SF
153.	4/29/48	McManus, M. T., 22 Steiner St., SF
154.	4/29/48	Elgin, C. J., 2156 Buena Vista, Ala.

General Counsel's Exhibit No. 3—(Continued)

155. 4/29/48 Doran, V. J., 3249 Sacramento, SF
156. 5/ 4/48 Seago, M. H., 1842 E. 14th St., Oak.
157. 5/ 5/48 Madino, A. G., 258 Herman St., SF
158. 5/10/48 Taylor, P. R., 2000 Beach St., SF
159. 5/10/48 S. Peterson, 3024 Dakota St., Oak.
160. 5/11/48 Nash, J. F., 35 Bemis St., SF
161. 5/11/48 Mathison, J., 3800 Quigley St., Oak.
162. 5/12/48 Hancock, W. J., 117 College Ave., SF
163. 5/12/48 Seppala, J. E., 172 Sixth St., SF
164. 5/17/48 Myers, F. L., 1130½ 87th Ave., Oak.
165. 5/20/48 Mancha, V. J., 55 Fifth St., SF
166. 5/20/48 Cozad, J. J., 1165 Valencia St., SF
167. 5/20/48 Boss, F. A., 269 Clinton Park, SF
168. 5/21/48 Pugh, C. C., 130 Manor Drive, SF
169. 5/25/48 Votaw, W. W., 706 Polk St., SF
170. 5/29/48 Jenkins, H. H., 685 Ellis St., SF
171. 6/ 8/48 Bowley, B. H., 1 Geneva St., SF
172. 6/ 9/48 Conway, A. J., 26 Hamilton St., SF
173. 6/ 9/48 Murphy, T. H., 373 Ellis St.
174. 6/ 9/48 Kunake, Mike, 140 Mason St., SF
175. 6/ 9/48 Houck, E. B., 1446 Underwood, SF
176. 6/ 9/48 Code, R. L., 549 Divisadero St., SF
178. 6/10/48 Sisson, A. J., 39 Avery St., SF
179. 6/10/48 O'Neill, G. G., 203 23rd St., Rich.
180. 6/10/48 Loynd, Bert, 567 11th Ave., SF
181. 6/10/48 Guinnar, D. A., 328 15th St., Oakland
182. 6/10/48 Foley, R. S., 821 Oak St., SF
183. 6/10/48 Fehleisin, F., 347 Laverne Ave., M.V.
184. 6/11/48 Valaris, F. P., 2235 Turk St., SF
185. 6/11/48 Anderson, J. M., 516 Second St., Corte Madera
186. 6/11/48 Connor, J. H., 632 Fourth St., SF
187. 6/14/48 Ralph, B. J., 2148 Encinal Ave., Rich.
188. 6/15/48 Newman, L. G., 2707 19th St., Rich., San Pablo
189. 6/15/48 Gibbs, M. N., 945 42nd Ave., Oak.
190. 6/16/48 Kessler, H. C., 849 Madrid St., SF
191. 6/22/48 Roehr, H. L., 639 Bush St., SF
192. 6/23/48 Valaris, R. B., 2237 Turk St., SF
193. 6/23/48 Lyman, H. D., 34 Turk St., SF
194. 6/23/48 Hill, J. W., 1392 Golden Gate Ave., SF
195. 6/23/48 Blades, Wm. B. K., 7040 Geary St., SF
196. 6/24/48 Carmen, C. E., 862 Folsom St., SF

General Counsel's Exhibit No. 3—(Continued)

197. 6/24/48 White, R. G., 446 Clement St., SF
198. 6/24/48 Martin, J. H., 680 Northside H-8, SF
199. 6/24/48 Vere, A. L., 539 Post St., SF
200. 6/24/48 Mason, P. B., 44 Third St., SF
201. 6/25/48 Treen, E. A., 427 Ninth St., SF
202. 6/25/48 Sweeney, R. F., 2803 Geary St., SF
203. 6/25/48 Martens, Frederick, 547 25th Ave., SF

Direct Examination—Resumed

Q. (By Mr. Magor): Mr. Camden, you say you have guards who are—do work other than waterfront work, is that correct? A. Yes sir.

Q. Now, in negotiations with the union, did the union negotiate for the company on behalf of the guards or do other than maritime work?

A. No.

Q. Your agreement with the union covers only the maritime guards, is that correct?

A. Yes sir.

Q. And the lists that would be prepared by the Port Labor Relations Committee by the union joint action of the union and the company would be only the guards who were engaged in maritime work?

A. On maritime work or those covered by the agreement.

Q. And that registered list is the means by which the company dispatches men to the maritime work, is that correct? A. That is correct.

Q. I have in my hand here, Mr. Camden, a re-

(Testimony of J. L. Camden)

turn to work agreement, evidently the date is August 8th, 1948.

A. No, it should be August the 7th.

Q. 7th day of August, 1948, signed by Pinkerton's National [65] Detective Agency, Incorporated, and ask you if that is your signature? (Exhibiting paper.) A. It is, yes, sir.

Q. And this is the agreement that was drawn up between—in your conference on August 7th with the union, is that right? A. Yes, sir.

Q. And those are the parties that were represented for the union? A. Yes, sir.

Trial Examiner Myers: Was that agreement executed at the meeting?

The Witness: Yes, sir.

Trial Examiner Myers: It was executed in your presence?

The Witness: In my presence, yes, sir.

Q. (By Mr. Magor): I notice here that Michael Johnson signs for the International Longshoremen and Warehousemen's Union. I propose to introduce this in evidence. [66]

* * * * *

(Thereupon the document above referred to was marked as General Counsel's Exhibit No. 4, in evidence.) [67]

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 4

RETURN TO WORK AGREEMENT

In meeting held today, August 7, 1948 under the auspices of the Federal Mediation and Conciliation Service, the International Long Shoremen's and Warehousemen's Union on behalf of ILWU Contract Guard's and Patrolmen hereafter referred to as the Union and the Pinkerton's National Detective Agency hereinafter referred to as the employer who are parties to the labor agreement dated August 1, 1946 as renewed on June 15, 1947 and June 15, 1948 due hereby agree as follows:

1. Preference of employment shall be given to members of the Union who are available, willing and able to work.

2. When new men are employed they will be notified that there is a labor agreement existing between the Employer and the Union.

3. The Union will be furnished each day a list containing the names, addresses and telephone number of all new employees.

4. When an employee is discharged or suspended the Employer shall within twenty-four hours following such discharge furnish the Union with a complete statement setting forth in detail the reasons for the discharge or suspension.

5. Section 10 of the labor agreement "vacations" sets forth all of the qualifications for vacation pay and no other qualifications shall be added.

6. Representatives of the Employer and the Union will meet within the next seven days to revise the current registration list.

General Counsel's Exhibit No. 4—(Continued)

7. Preference of employment on steady jobs shall be given according to seniority to men on the registration list.

8. There shall be no discrimination or reprisal by the Employer against any employee in this dispute.

Signed in San Francisco, California, this seventh day of August, 1948.

Pinkerton's National Detective Agency, Inc.

By /s/ J. O. CAMDEN,
International Longshoremen's and Warehousemen's Union
/s/ MICHAEL JOHNSON
/s/ LAWRENCE L. JOHNSON
/s/ M. McHUGH
/s/ ERNEST J. EVON
/s/ ALBERT C. ALDEN

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 5, in evidence.) [73]

GENERAL COUNSEL'S EXHIBIT No. 5

CONTRACT GUARDS AND PATROLMEN

Preferred List—November 30, 1948

1.	7/ 2/25	Plathner, F. A., 74 Sixth St., SF
2.	1/ 3/39	Barry, N. P., 108 Wawona St., SF
3.	5/22/40	Hyland, T. F., 1371 23rd Ave., SF
4.	7/ 2/40	Duncan, F. F., 2365 Durant Ave., Oak.
5.	5/ 7/41	Alperin, Sidney, 438 O'Farrell, SF
6.	4/ 9/48	Davis, W. W., 742 Excelsior Ave.
7.	5/13/42	Evans, O. H., 6 Gaiser Ct., SF
8.	6/ 2/42	Plumb, F. M., 902 Divisadero, SF
9.	2/ 1/43	Cerruti, P., 1599 10th Ave., SF
10.	6/ 3/43	Wagner, H., 3232 Geary St., SF

General Counsel's Exhibit No. 5—(Continued)

11.	9/ 2/43	Mills, E. W., 669 Shrader St., SF
12.	11/ 1/43	Brooks, W. J., 805 22nd St., SF
13.	11/23/43	Schmierer, Dan, 1178 Eddy St., SF
14.	3/ 5/44	Graves, G. S., 226 Byxbee St., SF
15.	5/16/44	Bolhov, A. V., 1762 15th St., SF
16.	6/21/44	Bourda, J. A., 1732 Lyons St., SF
17.	7/14/44	Anderson, W. A., 412 Eighth St., Oak.
18.	7/14/44	Clark, F. B., 165 Crescent Ave., SF
19.	9/20/44	Costa, J. A., 1108 Jefferson, SL
20.	1/ 9/45	Brown, G. W., 121 Stanyan St., SF
21.	3/14/45	Fontaine, W. A., 616 Haight St., SF
22.	5/14/45	Townley, A. J., 123 Liberty St., SF
23.	5/31/45	Mergen, Michael, 20 Franklin St., SF
24.	9/ 6/45	Patrick, J. A., 192 East Vista, DC
25.	9/ 7/45	Welsh, J. R., 415 Divisadero St., SF
26.	9/ 7/45	Tucker, G. H., 1461 Alice St., Oak.
27.	9/26/45	Betts, R. F., 991 Valencia St., SF
28.	10/11/45	McElroy, O. L., 3068 San Bruno, SF
29.	10/15/45	Strong, C. P., 6 Octavia St., SF
30.	11/20/45	Reed, R. E., 864 Page St., SF
31.	12/12/45	Rees, E., 2495 Sutter St., SF
32.	2/19/46	Edgett, H., 205 Garden Lane, Colma
33.	2/19/46	Hoffman, M., 115-A Sanchez St., SF
34.	3/ 4/46	James, B. D., 820 McAllister St., SF
35.	3/12/46	Robinson, A. C., 412 Eighth St., Oak.
36.	3/19/46	Woodson, T. E., 1039 Mission St., SF
37.	3/19/46	Lundell, H. A., 707 26th Ave., SF
38.	3/25/46	Collins, Z., 6925 Mission St., SF
39.	3/25/46	Shorter, J. L., 117 Sanchez St., SF
40.	3/25/46	Woodward, R. E., 4157½ Broadway, Oak.
41.	4/10/46	Jones, A. W., 1149-A Ellis St., SF
42.	4/26/46	Nelli, J. P., 2522 34th Ave., SF
43.	4/27/46	Evon, E. J., 148 Shrader St., SF
44.	5/ 3/46	Mills, W. S., 2531 24th St., SF
45.	5/ 7/46	Livingston, L. C., 1901 Potrero Ave., Rich.
46.	6/ 8/46	Nielsen, C. A., 447 Eddy St., SF
47.	6/ 8/46	Schechter, B., 320 Turk St., SF
48.	6/13/46	Miller, H. H., 360 Arlington St., SF
49.	6/18/46	Kirk, W. N., 175 Sixth St., SF
50.	6/20/46	Cushing, E. E., 3220 16th St., SF
51.	6/26/46	Hagen, R. O., 424 S. 24th St., Rich.

General Counsel's Exhibit No. 5—(Continued)

52.	7/ 1/46	Lyons, B. J., 6 Octavia St., SF
53.	7/ 9/46	Drejes, C., 1350 Vermont St., SF
54.	7/30/46	Bradshaw, J. W., 507 Bush St., SF
55.	8/12/46	Damski, G. H., 1278 Market St., SF
56.	8/16/46	Reynolds, H. F., 669 Minna, SF
57.	8/19/46	Mchugh, M., 3178 Washington, SF
58.	8/19/46	Alden, A. C., 54 Fourth St., SF
59.	8/19/46	Bahnsen, H. H., 437 Cherry St., SF
60.	8/19/46	Cominoli, H. H., 542 Bush St, SF
61.	8/19/46	Farris, S. L., 475 Arlington St., SF
62.	8/21/46	Kimble, H. P., 286 Second St., SF
63.	8/22/46	Fortner, W. L., 408 Duboce St., SF
63a.	8/22/46	Morrison, C. D., 605 Jones St., SF
64.	8/23/46	Campbell, J., 631 59th St., Oak.
65.	9/ 2/46	Pires, Antone, 354 Coleridge St., SF
66.	9/ 9/46	Mahoney, J., 667 McAllister St., SF
67.	9/10/46	Gulick, George, 684 Folsom St., SF
68.	9/12/46	Prevot, W. U., 1838 Golden Gate, SF
69.	9/12/46	Smith, E. P., 2211 Geary St., SF
70.	9/14/46	Strode, R. B., 1814 Pacific Ave., SF
71.	9/17/46	Laska, M., 43 Guam Rd., SF
72.	9/18/46	Abena, F. J., 1080 66th St., Oak.
73.	9/27/48	Harper, T. M., 87 Third St., SF
74.	9/31/46	McCarthy, J., 50 Church St., SF
75.	10/ 2/46	Mendia, A. E., 50 Church St., SF
76.	10/ 5/46	Hillard, F. E. C., 684 Folsome St., SF
77.	10/ 8/46	Fischer, W., 145 Ney St., SF
78.	10/11/46	Johnson, L. L., 1217 San Bruno Ave.
79.	10/25/46	Jauch, H. N., 216 Parque Drive
80.	11/ 5/46	Silacci, T. P., 55 Fifth St., SF
81.	12/ 2/46	Anderson, D. H., 458 Castro St., SF
82.	12/17/46	Murray, J. E., 1420 E. 21st St., Oak.
83.	2/25/47	Turner, S. J., 3330 Kirkham St., SF
84.	3/12/47	Davis, T. E., 581 Haight St., SF
85.	4/24/47	Murphy, T. H., 273 Ellis St., SF
86.	4/27/47	McNeil, N. C., 1347 Eddy St., SF
87.	5/27/47	Loebl, Davis, 179 Jessie St., SF
88.	7/27/47	Curry, E. J., 447 Eddy St., SF
89.	7/28/47	Shotts, H. B., 150 Shrader St., SF
90.	8/ 4/47	Eckman, A., 566 Callan Ave., SF
91.	9/12/47	Mosquera, R., 737 McAllister St., SF

General Counsel's Exhibit No. 5—(Continued)

92. 10/10/47 Noble, H. R., 1925 15th St., SF
93. 10/14/47 Page, H. H., 1171 De Haro St., SF
94. 10/31/47 Millar, J. F., 261 Lobos St., SF
95. 10/31/47 Oller, E. M., 1430 Filbert, Oak.
96. 10/31/47 Selden, R. M., 420 Fairmount Ave., Oak.
97. 11/24/47 Peek, Alvin, 431 Diamond St., SF
98. 11/24/47 Taylor, J. C., 885 McAllister St., SF
99. 11/26/47 Share, Louis, 1505 Sutter St., SF
100. 11/26/47 Crank, R. M., 32 S. Meeker, Rich.
101. 12/30/47 LaBoube, A., 304 Poplar Ave., MV
102. 1/14/48 Crowley, E. W., 1558 Grove St., SF
103. 3/31/48 Manis, Sherlock, 2729 California, SF
104. 4/22/48 Creegan, Patrick, 159 Russ Bldg., SF
105. 4/ 6/48 Blake, William, 964 Howard St., SF
106. 5/10/48 S. Peterson, 3024 Dakota St., Oak.
107. 5/17/48 Myers, F. L., 1130½ 87th Ave., Oak.
108. 5/20/48 Mancha, V. J., 55 Fifth St., SF
109. 6/ 9/48 Kunake, Mike, 140 Mason St., SF
110. 6/19/48 Fehelisin, F., 34 LaVerne Ave., MV
111. 6/11/48 Anderson, J. M., 516 Second St., SM
112. 6/23/48 Blades, W. B. K., 30 Hill St.
113. 6/23/48 Hill, J. W., 1392 Golden Gate, SF
114. 6/29/48 Schwab, H. R., 716 Fourth St., SF
115. 7/ 2/48 Lauridsen, F. L., 820 McAllister St., SF
116. 7/ 4/48 Potter, T., 195 Seventh St., SF
117. 7/ 9/48 McElroy, F. A., 1528 Miller Ave., Oak.
118. 7/27/48 Roux, J. W., 116 Madrid St., SF
119. 8/13/48 Quiad, H. T., 2011 16th St., SF
120. 8/18/48 Diamante, Sam, 211 Gough St.
121. 8/24/48 Gilson, F. P., 1633 San Pablo, Berk.
122. 8/26/48 Munson, J. C., Golden State Hotel, SF
123. 9/13/48 Durbin, E. G., 684 Folsom St., SF
124. 9/14/48 Attenisia, J., 335 Irving St., DC
125. 9/14/48 Falgiano, A. E., 2050 Powell St., SF
126. 9/14/48 Cowan, M. M., 163 Willits St., SF
127. 10/ 4/48 Fischer, W. J., 1892 Fell St., SF
128. 10/ 5/48 Morris, W. C., 167 O'Farrell St., SF
129. 10/ 5/48 Olsen, C. Y., 1748 a Mission St., SF
130. 10/ 5/48 Howe, W. C., 737 Clayton St., SF
131. 10/ 5/48 Bagnall, M. F., 397 Ellis St., SF
132. 10/20/48 Sprinkle, L. A., 990 Geary St., SF

General Counsel's Exhibit No. 5—(Continued)

133. 10/22/48 Ashley, L. A., 516 Natoma St.
134. 11/10/48 Ward, T. J., 1609 Santa Clara, El Cerrito
135. 9/ 6/45 Tindria, M. T., 380 Eddy St.
136. 9/20/45 Tyler, F. M., 314 So. 24th St., Rich.

* * * * *

Cross Examination

Q. Is that correct. And you also testified that it renewed itself the second annual expiration date, is that correct? A. Yes sir.

Q. Now, you testified during this interval there was no change in any of the collective bargaining representatives with whom you were dealing during any of that period?

Trial Examiner Myers: I don't think he said that.

Mr. Bahrs: Well, I have it in my notes here.

Trial Examiner Myers: I think he said they changed but he didn't remember the individuals names.

Mr. Bahrs: I want to take him over that ground again.

Trial Examiner Myers: Go ahead.

A. Well, to my knowledge there was—no changes throughout the whole period of time. Our negotiations were handled by Mr. Johnson.

Q. (By Mr. Bahrs): Well, can you say whether at all times you dealt with Mr. Johnson, that he was acting solely and exclusively on behalf of local No. 34? A. No.

Q. Was he acting on behalf of any other labor organization? A. I wouldn't know.

Q. You know whether or not he purported to act

(Testimony of J. L. Camden)
on behalf of [74] the Contract Guards and Patrolmen's organization?

A. Well, there was a time there, a year or so ago, where I think, in the conversation with him, we were advised that there was a new controlling set up. In other words, the Contracting guards and watchmen, and it was an organizing committee. Now, of the details of it, I wouldn't know. We have no official—so far as we were concerned, we were still dealing with the same representatives of the union that we started out with. [75]

* * * * *

Q. All right. Just one other question. You had reference to a meeting in Mr. Bahrs office sometime between the 15th of June and the early part of August, and you stated that Mr. Johnson was present with an attorney from the union. At that meeting, did the attorney from the union state that it was the union's view that the agreement, which is in evidence, was still a valid agreement and that the union was insisting upon enforcement of the agreement?

A. That is my understanding, yes sir. [78]

* * * * *

THOMAS W. STENHOUSE

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows:

(Testimony of Thomas W. Stenhouse.)

Direct Examination

Trial Examiner Myers: What is you name, sir?

The Witness: Thomas W. Stenhouse. [79]

* * * * *

Q. (By Mr. Magor): Were you ever in the employ of the Pinkerton National Detective agency?

A. Yes, sir. [80]

* * * * *

Q. And what was your job, classification when you were employed in June of 1946?

A. Waterfront guard.

* * * * *

Q. (By Mr. Magor): After that, did you become the member of any labor organization?

A. I did.

Q. And could you tell me what the name of the labor organization was? [81]

* * * * *

A. I was a charter member of the C.I.O. and to the I.L.W.U.

Trial Examiner Myers: That statement you were a charter member of the C.I.O. and you were a charter member of the I.L.W.U., what did you join?

Q. (By Mr. Magor): What was the local number? A. Thirty-four.

Q. Local 34, I.L.W.U.? A. Yes, sir.

Q. When was the last day in which you worked for the company, Mr. Stenhouse?

A. March the 29th, 1948.

Q. And on March the 29th, 1948, what was the occasion for your——

(Testimony of Thomas W. Stenhouse.)

A. Mr. Jamison, the dispatcher, called me and told me that Mike Johnson told him that I wouldn't be available for work. And I asked him for what reason and he said that Mike Johnson [82] said there would be a letter following.

* * * * *

Q. (By Mr. Magor): Now, after, you say the last day you worked for the company was March the 29th, 1948, is that correct, Mr. Stenhouse?

A. Yes, sir.

Q. Now, after that date did you work for the company or did you go and see the company about a job? [84]

A. Yes sir. I always went to see them.

Q. When was the next time which you approached the company for a job?

A. I believe the first time I talked to Mr. Camden was about July the 19th of 1949. [85]

* * * * *

Q. Now, in this conversation with Mr. Camden in July of 1948, did you again go back to the company to apply for work? A. Yes, sir.

Q. And what was this date?

A. Well, on the same date, 19th—the 19th, I went back that evening to see Mr. Camden. He told me to call him 4:00 o'clock in the evening as he was busy, there was two or three men in the office at that time. So I went home.

Trial Examiner Myers: He told you that in the morning?

(Testimony of Thomas W. Stenhouse.)

The Witness: No, this was in the evening, I'd say about 2:00 o'clock when he told me that.

Trial Examiner Myers: Oh—all right.

The Witness: So, I called him at 4:00 o'clock that evening.

Trial Examiner Myers: On the telephone?

The Witness: Yes, sir. And he told me that I was put back on the payroll in the morning and that I would be given a call from his office for an assignment for work. I thanked him and hung up.

Mr. Bahrs: What was that? I am sorry, I didn't hear.

Trial Examiner Myers: Will the reporter please read the answer to Mr. Bahrs——

(Answer read.)

Q. (By Mr. Magor): Now, after this conversation with Mr. Camden, did you receive any call from the office assigning you to work? [86]

A. No, sir. I stayed at home until 6:00 o'clock, that is about the windup for the calls, and I called the office.

Trial Examiner Myers: When did you——

Q. (By Mr. Magor): When did you call the office?

Trial Examiner Myers: Now, let's see——

A. I called the office——

Trial Examiner Myers: Now, wait now.

A. —at twenty——

Trial Examiner Myers: What date did you see Mr. Camden?

The Witness: On the 19th.

(Testimony of Thomas W. Stenhouse.)

Trial Examiner Myers: And he said you would receive a call?

The Witness: Next day.

Trial Examiner Myers: Next day?

The Witness: Uh-huh.

Trial Examiner Myers: You said something about six o'clock—six o'clock in the morning or afternoon?

The Witness: I waited until six o'clock in the evening for the calls from his office, from the dispatcher.

Trial Examiner Myers: You stayed home all day that day?

The Witness: Yes, sir. You have to.

Trial Examiner Myers: All right.

The Witness: So I called the dispatcher.

Trial Examiner Myers: What time?

The Witness: Six o'clock. When I didn't get no call, I called him. [88] We are not supposed to call him. They are supposed to call us.

Trial Examiner Myers: Well, just tell us what you did.

The Witness: I called the dispatcher and I told him who I was, and I said—I asked him what was cooking, and he said "Just a minute." And he was looking on the sheet. There was nothing on the sheet, he says, "There is nothing on the sheet for you, Mr. Stenhouse." And I says "Okay." So that was all there was to that part.

Q. (By Mr. Magor): Well, after this conver-

(Testimony of Thomas W. Stenhouse.)

sation then, did you call the office or contact the office at any time?

A. I contacted the office in the morning.

Q. What date would this be, Mr. Stenhouse?

A. That would be 19th—or about the 21st.

Q. Of July, is that correct.

A. That is correct, yes, sir. So, I——

Q. Now, what time did you go over to the office?

A. I first called the office and talked to Mr. Camden. They put me in touch with Mr. Camden. Mr. Camden told me, "It's my fault, Mr. Stenhouse. I failed to tell them. You will get your four days' pay anyhow, and your five days for the following week.

Q. All right. After this conversation, Mr. Stenhouse, did you receive your four day's pay?

A. Yes, I got the four for the one week. I got four day's pay, yes, sir.

Q. Now, he told you that, "You will get your five days next [88] week," is that correct?

A. Yes sir.

Q. Were you called by the company the following week and dispatched to any job?

A. No sir, I went over on the—I was over in San Francisco on the Monday and——

Trial Examiner Myers: Monday what?

Q. (By Mr. Magor): What date, please?

A. Monday would be the twenty-sixth.

Q. That would be——

A. July the 26th, and I figured I'd try and get a swing shift job. And I go by the office to see about

(Testimony of Thomas W. Stenhouse.)

it, figuring that everything was fixed for me to go to work and I met Mr. Girard in the hall—Captain Girard.

Q. Do you recall what time it was, Mr. Stenhouse? A. Around three o'clock.

Q. What did you say to him?

A. In the evening?

Q. What did you say, Mr. Stenhouse?

A. Captain Girard asked me if I had seen Mr. Camden. I says, "no." He says, "He wants to see you." So, we both walked in the office together. Mr. Camden, after we got sit down, he said, "I just wanted to explain to you, Stenhouse, what the situation is. They are going to walk off the job if you walk on." "Well," I said, "if I was as selfish as they are—they don't care [89] whether I work or not, and I got four children to feed, I shouldn't care whether they work or not. So if you lose your contract with the A.P.L., they would naturally lose their jobs." So, he says, "Well, I will tell you before we go any further with this, I would like to talk to Mr. Kilpatrick," who is some kind of a head man at the APL.

Q. Would you explain what you mean by the APL?

A. American President Lines. Steamship lines. Steamship. I asked him how long it would take him to do this. He said, "Wednesday or not later than Thursday." I said, "Okay." So, I waited the balance of the week and never did hear from the office. Never did hear from Mr. Camden any more. Then

(Testimony of Thomas W. Stenhouse.)

I come over to San Francisco the following Monday.

Q. What date would this be?

Trial Examiner Myers: Got a calendar?

A. Well, August the 2nd, I believe. Around there.

Q. (By Mr. Magor): About August the 2nd?

A. Someplace. So, I met Mr.—Capt. Girard, and I told him I would like to have a talk with Mr. Camden, and he said, "Mr. Camden is in New York, and he won't be back until Saturday." I said, "Okay." So I—there was nothing I could do. So, I went on home.

Q. Now, at this conversation you asked Mr. Girard why you weren't assigned to work?

A. No sir. He knew—Mr.—Capt. Girard knew that I was [90] supposed to be given work, see.

Mr. Bahrs: I am going to object to that, if the court please——

Trial Examiner Myers: Yes, I will sustain the objection.

Q. (By Mr. Magor): Well, after this conversation with Capt. Girard, Mr. Stenhouse, were you assigned to any job by the company?

A. No, sir.

Q. Did you go back and see the company or call them or did they call you?

A. Yes, sir. When he told me——

Mr. Bahrs: When was this, please?

Mr. Magor: When was this?

Trial Examiner Myers: Wait now, let's get—

(Testimony of Thomas W. Stenhouse.)

let's fix this now. You—what conversation are you referring to now?

The Witness: Coming back from the time when Mr. Camden came back from New York.

Trial Examiner Myers: Fix the date.

Q. (By Mr. Magor): Now, when was the next time you went over to see the company?

A. I got a call from the Captain on the 7th of August, the 7th.

Q. Captain who? A. Captain Girard.[91]

Q. When was this, Mr. Stenhouse, to the best of your recollection?

A. About nine o'clock in the morning.

Q. What did Capt. Girard say to you?

A. He told me he had his hands full over here, that there was a strike upped, strike was pulled at 39 and was moving up to 42 and 46.

Trial Examiner Myers: We don't know what all that means. What does that—what does that mean?

The Witness: Sir?

Trial Examiner Myers: What is all this 39—42?

The Witness: Them's piers where the ships are.

Trial Examiner Myers: All right. Go ahead.

A. He said he had his hands full. He said, "Could you furnish me with some men." I said, "Well, I couldn't furnish you with no strike breakers, Captain." I said, "But that is a phoney strike they are pulling over there. But I will come and work." And there was lots more of them men that

(Testimony of Thomas W. Stenhouse.)

was being debarred from going to work would have went.

Q. (By Mr. Magor): Did he tell you who called the strike? [92]

* * * * *

A. The next time I talked to Mr. Camden was on August the 19th. I went over to see him and I told him that I understood that he had signed an agreement with these fellows and he said he had——

Trial Examiner Myers: Wait a minute, now. Wait. You are talking of a lot of things that we don't know what you are talking about. What fellows?

The Witness: Well, he meant Mike and the representative of the——

Trial Examiner Myers: Go ahead.

The Witness: —CIO. He said he was forced to do it. That the American President Lines had given him twelve hours to move two passenger ships.

Q. (By Mr. Magor): Now, at this time did he offer you any assignment? A. No, sir.

Q. Did you ask him for an assignment?

A. No, sir, I never asked him then because the understanding was that I was to be put to work?

Mr. Bahrs: What was that?

A. The understanding was—him and I had—that I was to be [93] put back to work. Mr. Camden and I——

* * * * *

Q. (By Mr. Magor): Now, Mr. Stenhouse, you say that at the time you saw Mr. Camden on July 26th, 1948 you were talking to him, and he told you,

(Testimony of Thomas W. Stenhouse.)

"I wanted to explain to you what the situation was, Mr. Stenhouse. They are going to walk off the job if you walk on it." Did Mr. Camden explain to you who he meant by "they"?

A. Well, when I come to the Board, the Board asked me that question and said, "We would like for you to find out who he meant by 'they' ". So, then on August the 9th was the first time I could get to see Mr. Camden, because he was in New York. I asked him—I met him in the hallway, I said, "Mr. Camden, are you busy?" And he said, "Yes, I got my hands full." Well, I said, "It won't take me long." I said, " I went to the Board and they want to know who you meant by 'they' would walk off the job if I walked on." Mr. Camden said, "They'll have to ask Mike Johnson that question." [94]

* * * * *

Q. As I understand, you have testified here, or perhaps you had better repeat here so we don't misquote you, as to what Mr. Camden told you at that time? A. What time?

Q. On the 26th. A. On the 26th?

Q. Yes.

A. That is when Capt. Girard—Capt. Girard met me in the hallway and asked me if I had seen Mr. Camden. I didn't go there with the reasons to see Mr. Camden. I went in there to see the office, the other office, about getting an assignment [112] on a swing shift, if possible an assignment on a swing shift job, if possible, and Mr.—Capt. Girard asked me if I had seen Mr. Camden and I said,

(Testimony of Thomas W. Stenhouse.)

"No." And he said,—"Well,"—he said, "he wants to see you." So, we went in, him and I both walked into Mr. Camden's office. Mr. Camden said, "I want to explain to you what the situation is. They are going to walk off the job if you walk on." Now, that is just exactly the words—— [113]

* * * * *

Q. You never asked him for a job after that day? A. Because they told me——

Q. No, no. Just answer the question.

A. He told me I'd get a call from the office that day.

Q. Will you answer the question please?

Trial Examiner Myers: Did you say in some words, "Give me a job?"

The Witness: No sir.

Q. (By Mr. Bahrs): Never?

A. No sir—they don't give me a job.

Q. After July 19th, is that right?

A. No sir. [116]

* * * * *

JOHN P. CONNERS

a witness called by and on behalf of the General Counsel, National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

Trial Examiner Myers: What is your name, sir?

The Witness: John T. Conners. [130]

* * * * *

(Testimony of John P. Conners.)

Direct Examination

Q. (By Mr. Magor): Mr. Conners, were you ever in the employ of the Pinkerton's National Detective Agency, Incorporated? A. Yes sir.

Q. When were you first employed by the company?

A. September 23, 1946.

Q. And at that time, what position were you employed as?

A. As a guard on the waterfront. [131]

* * * * *

Q. (By Mr. Magor): When did you become a member of the——

A. Fifteen days after I was employed by the Pinkerton's Detective Agency, I was told——

Trial Examiner Myers: Wait a minute. When you went in and got a job with Pinkerton's Detective Agency, did you belong to the International Longshoremen and Warehousemen's Union?

A. No sir. Not at that time.

Trial Examiner Myers: Well, why don't you listen to the question?

Q. (By Mr. Magor): When did you join, Mr. Conners?

A. I joined fifteen days after I went to work for Pinkerton's. At the time that I——

Trial Examiner Myers: Never mind. What was the name of the union?

A. I.L.W.U., Local 34, Pier 3.

Q. (By Mr. Magor): And during the time that

(Testimony of John P. Conners.)

you worked for the company, did you continue to be a member of that labor organization?

A. Yes sir. [132]

* * * * *

Q. (By Mr. Magor): When was the last time that you paid dues?

A. May of 1948. [134]

* * * * *

(Whereupon the document above referred to was marked as General Counsel's Exhibit No. 6, in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 6

International Longshoremen's & Warehousemen's Union

Book No. 232 Date: 6/14/1948

Received of J. T. Connors.....Dollars

Write in amount received

√ Check months paid for:

Jan. Feb. Mar. √Apr. May June July Aug. Sep. Oct. Nov. Dec.

No. of Dues Stamps $2.50
No. of Init. & Reinst. ....
Other Items (describe)..... ...
M 112687 Total $2.50

Received by [signed] M. Johnson, Financial secretary.

(Testimony of John P. Conners.)

Q. (By Mr. Magor): Now, during the time you were employed by the company in this case, Mr. Conners, during the month of August, what job were you assigned to?

A. August of what year?

Q. 1948.

A. I was on the Marine Lynx.

Q. And when were you assigned to that ship?

A. About June.

Q. About June. Had you been working steadily at the Marine Lynx? A. Yes.

Q. What shift were you working?

A. Eleven to seven.

Q. Eleven a.m. to——

A. No, eleven p.m. to seven a.m.

Q. How were you assigned to that ship, Mr. Connors?

A. Well, automatically we were—we worked on that ship, we was working steady, you went back there every night regardless. And then the only time the company would ring us up, when we was supposed to have our days off. We never had regular days. We was supposed to have two days a week off.

Q. When you were first assigned to that ship, what was the manner in which you were assigned to it? A. Sir?

Q. When you were first assigned to the Marine Lynx, you say some time in June——

A. They rang me up to the office and told me "Take that ship [136] over on a steady job."

Q. Who called you from the office?

(Testimony of John P. Conners.)

A. Mr. O'Neal.

Q. What is Mr. O'Neal's job——

A. Day dispatcher.

Q. Now, when was the last time in which you worked on the Marine Lynx?

A. I worked Saturday, August 7th. I got off at seven a.m.

Q. And were you to report to the Marine Lynx that evening?

A. That evening at eleven o'clock.

Q. Did you report that evening, Mr.——

A. No sir. I was rang up at nine o'clock that night by Mr. Baxter and told not to report to the Marine Lynx.

Q. Can you identify Mr. Baxter?

A. Yes sir.

Q. What is Mr. Baxter's position with the company?

A. Well, he was what I—figure was a extra dispatcher on Saturday nights, when the other men had their time off. And he went out and so listed job in the meantime.

Q. And——

A. He told me to ring Mr. O'Neal up the next day, that he'd tell me everything.

Q. All right. Did you report back to the Marine Lynx that evening?

A. No. He didn't tell me to report back. I didn't report [137] back.

Q. Subsequent to this call, you say was on August the 9th?

(Testimony of John P. Conners.)

A. No, that was August 7th.

Q. August the 7th. Did you go down to see the company, or did you receive any work from the company?

A. Well, I phoned Mr. O'Neal.

Q. When did you phone Mr. O'Neal?

A. On the 8th, about nine o'clock in the morning. I asked Mr. O'Neal——

Trial Examiner Myers: Never mind.

Q. (By Mr. Magor): What did you say to Mr. O'Neal?

A. I said, "Mr. O'Neal," I said, "What is the score?" "Well," he said, "We got a list of names here that Mike Johnson brought up to us, and your name is on the list of non-payment of dues. So, we can't do anything about it." "Well," I says, "It's funny, can't you see somebody or something," and he said, "I'll try to get ahold of Captain Gerard and Mr. Camden and phone you back." And that's the last I heard of it.

Mr. Leonard: Move to strike that on the ground it is hearsay and not binding on the respondent that I represent.

Trial Examiner Myers: Motion denied.

Q. (By Mr. Magor): Now, subsequent to this conversation, or after the conversation on August the 8th, did you go down and see the company?

A. I went down there August the 9th. [138]

Q. At what time did you go down?

A. I went down about ten o'clock in the morning.

(Testimony of John P. Conners.)

Q. Was anybody with you, or were you alone?

A. Yes sir, Mr. Stenhouse and myself.

Q. Who did you see from the company at that time?

A. Well, as we come down the hall, we met Mr. Camden.

Trial Examiner Myers: Anybody else?

Q. (By Mr. Magor): Was anyone with Mr. Camden? A. No sir.

Q. What did you say to Mr. Camden?

Mr. Leonard: Object to the conversation, so far as the respondents I represent are concerned, on the ground it is not binding on them, and as to them, it is hearsay.

Trial Examiner Myers: Objection overruled. Of course, if it is not binding on them there can't be any finding against your client. I will overrule the objection. Go ahead.

A. I met Mr. Camden in the hallway, I was with Mr. Stenhouse and myself, and I asked him, I said, "How come I'm not working," I said, "I have a steady job on Marine Lynx, and it looks like my card has been pulled?" And he said, "Who told you that?" And I said, "Mr. O'Neal," and he says, "I will find out about that." "Well," I says, "I'm not working." So, he went in the office, he says, "You go into Captain Gerard's office and see Captain Gerard," which I did, with [139] Mr. Stenhouse.

Q. Did you talk to Captain Gerard at that time?

A. Yes sir.

Q. What did you say to Captain Gerard?

(Testimony of John P. Conners.)

A. Well, I talked to Captain——

Mr. Leonard: May I have a continuing objection to these questions and answers?

Trial Examiner Myers: The objection is overruled. You better make the objection when you deem necessary.

Mr. Leonard: Well, then, I'd like to make it present now, on the grounds that the respondents were not present and it is not binding on them.

Trial Examiner Myers: Objection is overruled. Go ahead.

A. I went in to see Mr. Gerard there and I told him, I says, "How come I am not working on the Marine Lynx steady?" and he said, "Well," he said, "We had to sign some kind of an agreement," he said, "The American President Lines are forcing the issue. We'll either lose the contract, or else we'll"—I says, "I'm"—"I'm on the preferred list there," and he looked in his desk and he come out and he says, "Well, yes. You are 85," he says, "There'll be enough work over in Oakland to take care of you." And I says, "I can't go on that because," I said, "I have a sick wife and family to take care of besides myself. Four all told," I says, "If I can't get [140] any satisfaction from you I'm going to the National Labor Relations Board." "Well," he said, "I think that would be a good idea." I says, "As far as matters are concerned." He said—he said "We would be willing to pay three or four men's wages to see that things come to a head." And I said, "Well," I said, "I am going up

(Testimony of John P. Conners.)

to make the charges—further charges against both organizations, because I am not working and I can't afford to lay around."

Q. Well, were you talking to Captain Gerard at that time; did he say why you weren't back on the Marine Lynx?

A. He said on account they had a strike, and conditions—Mike Johnson had a list that he come up there Saturday morning with this list and my name was on the list.

Q. During the time that you were working on the Marine Lynx now, Mr. Conners, where was that ship tied up?

A. Well, the first time I run on it, it was tied at 5th Avenue in the Naval Base there, and then it moved.

Q. Well, state the last day now, that you were working on the ship?

A. It was in Moore's Shipyard.

Q. Where is that?

A. At 1st and Adeline in Oakland.

Q. In Oakland? A. Yes.

Trial Examiner Myers: 5th Avenue, is that, in Oakland, [141] too?

The Witness: Sir?

Trial Examiner Myers: 5th Avenue here?

The Witness: Yes sir.

Trial Examiner Myers: Was that Oakland?

The Witness: Yes sir.

Trial Examiner Myers: And it's always been in Oakland?

(Testimony of John P. Conners.)

The Witness: Yes sir.

Trial Examiner Myers: Is that right?

The Witness: Yes sir—well, no sir. Not at first. The year before that it was over——

Trial Examiner Myers: Well, when you were on it?

The Witness: Yes sir. It was in Oakland at all times.

Q. (By Mr. Magor): Now, the last day you worked on the Marine Lynx, I take it, you testify it was about August 7th?

A. That was the morning of August 7th I got off at seven a. m.

Q. How long had the ship been over there at that time?

A. Well, I imagine it went over about January or February, the first of the year of '48.

Q. In '48. Now, during the time you were working on it, in the first week of August, 1948, was there any strike over there that you know of your own knowledge?

A. Not to my knowledge.

Q. After this conversation with Captain Gerard on August [142] the 9th, Mr. Connors, did you after that go back to the company?

A. No sir. I received a call from him the 10th of August, from Mr. Bishop about nine p.m. to report to Pier 41 in San Francisco on the detainee watch.

Q. Did you have anything to say to Mr. Bishop at that time?

(Testimony of John P. Conners.)

A. No. At the time I said, "Well, Mr. Bishop," I told him, I says, "Why send me way over to the city," I says, "I have a steady job on the Marine Lynx." He said, "I don't know anything about it. I don't do the dispatching. The day dispatcher makes up the list."

Q. And after this conversation with Mr. Bishop, did you report to Pier 41, or did you see the company?

A. No sir. I contacted Mr. Camden the next morning about nine p. m.—nine a. m.

Q. What morning was that; August 11th?

A. Yes sir, the next morning.

Q. What did you say to Mr. Camden at that time?

A. I said—asked Mr. Camden, I said to Mr. Camden, I says, "Mr. Camden, you wanted me to report to Pier 41 over there on the graveyard shift"—which was from twelve to eight—"On the detainee watch," I says, "I have got to go behind boxcars and everything to get to the job and everything, and jeopardize my life," I says, "Do you want me to pack a gun?" And he says "No, no, no, no, no." [143]

Q. What did you mean "jeopardize your life" Mr.——

A. Well, I practically figured, I think, by Mike Johnson, that I was on the list and that was the reason I figured I'd be jeopardized my life, because I was taken off the Marine Lynx and put on

(Testimony of John P. Conners.)

Pier 41, and the man wasn't on the preferred list was working in my place.

Q. What did Mr. Camden have to say to you?

A. Mr. Camden says, "Well," he says, "I don't want none of that. No, no, no." He says. And then he says "I will ring up Mr. Gerard and he will give you a replacement,"—that I didn't have to go over there to Pier 41.

Q. And Mr. Camden said he would ring up Mr. Gerard and give you a replacement, you wouldn't have to report, is that correct?

A. That's right, sir.

Q. Well, after that conversation with Mr. Camden on August the 11th, did you receive any call from the company?

A. I received one about August the 21st from Lieutenant Jamison. He says, "I see your name is on the list here, Conners, from last week." He says, "You didn't work." And I says, "No sir, I didn't work that week or the two or three weeks before that."

Q. What did Jamison have to say, Mr. Conners?

A. Well, he says, "You know," he says, "We got an agreement signed." He says, "Union agreement signed now." I [144] says, "Yes. It looks like a back door agreement to me." He says—to me—I said, "So"—he said, "Well, I don't know anything about that," he said, "I only got charge of the instrumental work." So, I says, "What was the idea of ringing me up?"

(Testimony of John P. Conners.)

Q. Did he offer you any assignment, Mr. Conners? A. No sir.

Q. Well, after this conversation with the company, did you receive any calls?

A. Yes sir. September the 16th.

Q. From the dispatcher? Who were you talking to at that time?

A. Mr. O'Neal, the day dispatcher.

Q. What time was this?

A. It was around eleven—11:30 the 16th of September, in the morning, a.m.

Q. Did Mr. O'Neal call you up?

A. Yes sir.

Q. What did Mr. O'Neal have to say to you?

A. He dispatched me to Pier 44 in the bulkhead work that was out in front of the pier, and I—and I says to him, I says, "Well, how am I going to make that?" I says, "I haven't got a paid up dues book, and will they give me a clearance?" He said, "Yes sir. That will be taken care of. You go down and see Mike Johnson at 90 Market Street and Mike Johnson [145] will take care of you."

Q. Was anything else said at that time?

A. Not to him, I didn't say anything more to him. I says, "O. K.," I says, "I will take a chance, too." I——

Trial Examiner Myers: Wait a minute.

A. I contacted——

Trial Examiner Myers: Wait a minute.

A. Sir?

Trial Examiner Myers: Is that the end of the

(Testimony of John P. Conners.)

conversation with O'Neal? A. Yes sir.

Trial Examiner Myers: All right.

Q. (By Mr. Magor): After that conversation with O'Neal, did you go down to see Mike Johnson?

A. Yes sir. Me and a gentleman named Mr. Slater.

Q. When did you go down to see Mr. Johnson?

A. About 2:35—2:30, somewhere in that neighborhood.

Q. The same day?

A. Yes sir. In the afternoon, p. m.

Q. Where did you go to see Mike Johnson?

A. 90 Market Street.

Q. Where are his offices located?

A. In the back end of a saloon. There is a restaurant on one side and—restaurant on the other, saloon on the right and restaurant on the left. [146]

Q. There is a saloon on the right-hand side and a restaurant on the left? A. Yes sir.

Q. His offices are in the back of the building?

A. Yes sir.

Q. And you pass the saloon? A. Yes sir.

Q. And what does the printing say on the door of Mike Johnson's office?

A. On the door of Mike Johnson's office? I. L. W. U., C. I. O. Right on the window. It's a little window about the size of this desk, a little wider.

Q. Was anybody with you when you went to see him? A. Yes sir, Mr. Slater.

Trial Examiner Myers: What is Mr. Slater's first name? A. Walter.

(Testimony of John P. Conners.)

Q. (By Mr. Magor): What did you have to say to Mike Johnson when you saw him at that time?

A. Well, we said, we mentioned that we come down there for a clearance. The first words he says "Well," he says, "You got a hell of a crust coming down here."

Q. What did you say to that?

A. Well, I says, "A man's got to live," I said, "work," I says. "Well," he says, "I don't know. You guys got jurisdiction." He says, "You fellows taking—going down there [147] on the waterfront," he says, "with all the marine cooks, radio men, marine firemen, marine engineers, longshoremen," — he says—he says, "I am not responsible for what happens down there." And he says—he said, "I don't know if I will give you fellows a clearance or not." And then he stayed there for a while, about five minutes, and then he said, "I am going out to make a phone call." So, he went out and made a phone call, I guess he did, I don't know, and pretty soon, about five minutes after, a fellow named—I don't know his last name—worked for the Pinkerton's Agency, they called him "Frenchy" is his first name—he came in and says "What the hell you guys doing here?" And I says, "Is it any of your business what I am doing here?" I said, "I am doing business with Mike Johnson." "Well," he says, "I am on the committee." I says, "I don't know anything about that," I says, "That's all." Then he went out and that's all the further we— and we sat there and that was all.

(Testimony of John P. Conners.)

Trial Examiner Myers: Mike Johnson come——

Q. (By Mr. Magor): Did Mike Johnson ever come back?

A. No. We sat there for forty-five minutes. At different times I went through the hallway, and Mike Johnson was sitting in the saloon there.

Q. Did you at any time look at your watch to see—— A. Yes sir.

Q. What time was it when you left? [148]

A. We left there about a quarter to four.

Q. Did you see Mike Johnson as you left?

A. I saw him sitting in the—on the stool in the saloon as we left.

Q. Did he say anything to you?

A. No sir.

Q. What did you do after that?

A. We come up to the N. L. R. B.

Q. Now, after that, did you receive any calls from the company, or did you go down to the company?

A. I went down to the company the next day, that is September the 17th, at 1:00 p.m.

Q. And who were you talking to at that time?

A. I was talking to Captain Gerard, Mr. Baxter and Mr. O'Neal.

Q. Was anybody with you, Mr. Conners?

A. No sir. I was alone at the time.

Q. Now, what did you have to say to these three gentlemen?

A. I started in talking to them and the phone rang, and Baxter—I mean, O'Neal went to the

(Testimony of John P. Conners.)

phone and answered, and Mike Johnson had rang up. He says, "Where are them guys that wanted that clearance, to come down here. They going to come down here or not?" I says, "O'Neal, you go back and ask Mike Johnson if a man has to have his book paid up—full book paid up?" He said—I could hear it as well as I know my own name, he says, "Certainly," over the phone. [149]

Q. Did Mr. O'Neal come back after that conversation? A. Yes sir.

Q. What did Mr. O'Neal say?

A. He told Captain Gerard and Mr. Baxter the same thing as he told me, but I heard it myself.

Q. What did he say?

A. He says, "Certainly you have to have the dues in the book paid up," and Captain Gerard says, "That's new to me."

Q. Did they offer you any assignment at that time?

A. No sir. I says, "Captain, what are we going to do with the situation. I can't afford to lay around here." "Well," he says, "I don't know what to do about it," he says. "I will let you know later." I said, "Well, you going to give me a ring or assignment, or what you going to do about it?" He says, "well, I will let you know later." That was all.

Q. Now, you say that this assignment they offered you, that you had to go down to see Mike Johnson—was it Pier 44? A. Pier 44.

Q. And you tell me where Pier 44 is located, Mr. Conners.

(Testimony of John P. Conners.)

A. That is on the west end of the waterfront; south end of the waterfront.

Trial Examiner Myers: Well, which is it?

Q. (By Mr. Magor): Which side; the San Francisco side or Oakland side?

A. It's on the San Francisco. [150]

Trial Examiner Myers: On the south side?

The Witness: Well, it would be down this way (indicating)—that would be south.

Trial Examiner Myers: All right.

Q. (By Mr. Magor): And at the time, Mr. Conners, to your knowledge, personal knowledge, were the longshoremen on strike? A. Yes sir.

Q. San Francisco side? A. Yes sir.

Q. Picket lines established? A. Yes sir.

Q. And for you to report for work, it would be necessary for you to pass through those picket lines, is that correct?

A. The job that was assigned to me was in front of the pier, the bulkhead work would be in front of 44, walking up and down in front of all them men who were on strike.

Trial Examiner Myers: The question is: "Would you have had to pass"—— A. Yes.

Trial Examiner Myers: (Continuing) —"through the picket line?" A. Yes sir.

Q. (By Mr. Magor): Well, after this conversation with the company, Mr. Conners, about September 17th, I think you testified, did you receive any calls from the company? [151] A. No sir.

(Testimony of John P. Conners.)

Q. Did you go down and see the company then?

A. I rang them up three or four times.

Q. Do you recall when you rang them up; what dates?

A. Oh, I don't know the dates offhand. I never kept—about four or five times I rang up Mr. O'Neal, the day dispatcher.

Q. And what did Mr. O'Neal have to say?

A. Mr. O'Neal says, "Well, it hasn't been settled yet." He says, "You only had a temporary agreement," he says.

Q. Did he offer you any assignment?

A. No sir.

Q. You know about when you called Mr. O'Neal?

A. Well, let me see—it was September—around the later part of the month in September, around the 20th—24th.

Q. Now, Mr. Conners, when you went to work for the company, did they furnish you with a uniform? A. Yes sir.

Q. Do you still have that uniform?

A. Yes sir.

Q. You ever been asked to turn it in?

A. No sir.

Q. When was it you said the last time you paid your dues to the union?

A. That was in—I—the last was April [152].

Q. At that time you paid to Mike Johnson, is that right? A. Yes sir.

Q. Had you ever received any notice from the union for nonpayment of dues? A. No sir.

(Testimony of John P. Conners.)

Q. Ever been cited before any of their grievance committees? A. No sir.

Q. You have, up to the present time, have you ever been offered an assignment by the Pinkerton's National Detective Agency?

A. Not lately, sir.

Mr. Magor: I have no further questions.

Trial Examiner Myers: Mr. Bahrs, any questions?

Cross Examination

Q. (By Mr. Bahrs): Mr. Conners, did you ever do any industrial work? A. No sir.

Q. Did you ever—the only work you have ever done for Pinkerton's is a guard on the waterfront work, is that right? A. Yes sir.

Q. Did you ever work for Pinkerton's on the San Francisco side?

A. I have worked on both sides; Oakland and San Francisco.

Q. Did you work on the San Francisco side prior to August 9th? [153]

A. No sir. I was over on the Oakland side. [154]

* * * * *

Q. Now, you have testified here that on August the 10th you got a call from Mr. Bishop?

A. Yes sir.

Q. To report for work at Pier 41?

A. That's right, sir.

Q. That was a regular waterfront assignment, is that correct? A. Yes sir. [157]

* * * * *

(Testimony of John P. Conners.)

Q. Wednesday night at midnight.

A. That's Thursday.

Q. Yes. And did you accept that assignment?

A. No, I didn't refuse it or I didn't go down. I rang Mr. Camden up on the morning of August the 10th at 9:00 a.m.

Q. Yes. And what—what happened then?

A. And I told Mr. Camden "They put me on a detainee watch at Pier 41, and I shouldn't see why I should go down there when I was down at Marine Lynx steady," and I said, "If I had to go over there," I said, "You want me to carry a gun?" He said, "No, no, no. I don't want any of that." I says, "In the meantime, I have to go behind boxcars and everything to get to that assignment." "Well," he said, "I would advise you not to take it." He said, "I will ring up Captain Gerard and he will give you a different assignment." That was all.

Q. Did Mr. Camden offer you any work on August the 19th?

A. No sir. He said he was too busy at the time, that Mr. Stenhouse and myself was there, and we met him in the hallway and he said he just came back from New York. He was awful busy, on account of the strike I was pulled off and we should go in and see Captain Gerard. I asked him why I wasn't working at the time, why I was pulled off from Marine Lynx steady job. "It looks like my card has been pulled." And he says, "Who told you your card was pulled?" I said, "Mr. O'Neal." [158] So, he went right in to Mr. O'Neal, he says, "You

(Testimony of John P. Conners.)

and Mr. Stenhouse go in and see Captain Gerard."

Q. Now, you have also testified, I believe, here, that on September the 16th Mr. O'Neal offered you work on Pier 44. A. That is right, sir.

* * * * *

Q. On—did you receive any other offers of employment from Pinkerton's?

A. Outside of August the 21st?

Q. August the 21st.

A. Mr. Jamison rang up and he didn't offer me no job—and then in September—and then around October 7th of 1948, at around eight or nine o'clock in the night, Mr. Jamison rang up and told me that he had a job for Saturday and Sunday, industrial work, and wanted to know if I'd take it. It was two twelve hours shifts. I said—and I had something lined up in view at the time, and it jeopardized my other position. So, I had to refuse.

Q. You refused that assignment?

A. Well, I was not never—going to work for Pinkerton on [159] industrial work, because that is a ninety cents job, and my job calls for a dollar twenty cents an hour. [160]

* * * * *

Q. Did you ever refuse an assignment of work for Pinkerton's because you already had a steady job?

A. Outside of when I went to work a few days after Lieutenant Jamison called me up, on the two day assignment, and I would jeopardize my job, and I figured—I told him at the time, I says, "That

(Testimony of John P. Conners.)

I have got something in view and," I says, "I think I will be able to make it Monday and then two twelve hour jobs would jeopardize my time."

Mr. Magor: Could we have the date on that, please?

A. That was around—oh, on Saturday night—Saturday [162] night, I think.

Q. (By Mr. Bahrs): In October? A. Yes.

Q. The week in which October 8th occurred?

A. Yes sir. That was the time.

Q. At that time were you employed at the Moore Shipyards?

A. No sir. I never worked for Moore Shipyards.

Q. All right. Did you at that time—did you have a steady job?

A. No sir, I didn't go to work until the following week. I just got——

Q. A prospect of a steady job?

A. That's right.

Q. Did you secure a steady job?

A. Yes sir.

Q. The following week?

A. Yes sir, I have.

Q. Doing what kind of work?

Mr. Magor: Object to the materiality of this line of questioning.

Trial Examiner Myers: Overruled. Go ahead. You may answer. A. Sir?

Trial Examiner Myers: You may answer.

A. As a guard—guard and janitor. [163]

Q. (By Mr. Bahrs): Where?

(Testimony of John P. Conners.)

A. The Dell Beckmans Company in Berkeley, 5th and Virginia.

Q. You have been working there ever since?

A. Yes sir. That's the last six months, practically.

Mr. Bahrs: That is all. [164]

* * * * *

Q. In August of 1948, did Local 34 of the I.L.W.U. have anything to do, if you know, with Pinkerton's; have any contracts or anything else? Local 34 was in the picture at that time.

A. No sir, on account of the Taft-Hartley Law went into effect.

Q. Local 34 was not in the picture? [174]

A. No sir. The International took over.

Q. The International took over. What do you mean by "the International"?

A. Just what I said. [175]

* * * * *

Q. All right. The picket lines in San Francisco that you knew about were those of the longshoremen, the cooks and firemen and the radio officers?

A. Yes sir.

Q. And in order to go to work you would have to have a clearance to go through those picket lines, is that right?

A. That's right, sir. And a paid up dues book.

Q. Now, wait a minute. I move that that be stricken as not responsive to the question.

Trial Examiner Myers: Motion denied.

Q. (By Mr. Leonard): You had to have the

(Testimony of John P. Conners.)

clearance to go through the picket lines, is that right? A. That's right.

Q. And when you talked to O'Neal about a clearance, that was the clearance you were talking about, is that right? A. Yes sir. [178]

* * * * *

Q. What did you say then?

A. Well, I says, "A man—otherwise a man's gotta eat. He's gotta live." I says—I says, "On the 26th, Mike, you said you'd take care of things for me in regards to the dues at the last meeting." I talked to him.

Q. What did he say to that?

A. He didn't have anything to say.

Q. He did not say anything to that. All right. What else did he say?

Trial Examiner Myers: 26th of what?

A. July 26th, at the meeting.

Q. (By Mr. Leonard): What else was said at this conversation in Johnson's office on September 16th?

A. Well, he says—he says, "If you fellows are going down there," he says, "you know there is maritime cooks, firemen, engineers, radio men, longshoremen and," he says, "you know what this job consists. It's bulkhead work right out in front of all of them." He says, "I am not responsible for what happens to fellows, but," he says, "I don't know if I will give you fellows a clearance or not."

Q. And then what happened?

A. And then he went outside and he went in the saloon.

(Testimony of John P. Conners.)

Q. Did he tell you where he was going?

A. No. He said he was going out to make a phone call. [180]

* * * * *

Redirect Examination

Q. (By Mr. Magor): What did Mr. Camden say to you?

A. He said, "We'll have to excuse you from that. I will contact Mr. Gerard and tell him to give you another job."

Q. Now, in this conversation you had with Mr. Johnson on September 16th, did he offer you a clearance?

A. He offered me a clearance. He says, "But you fellows, your life is in danger to go down there," he says, "I'm not responsible for it, but," he says, "there's picket guards down there and there's marine cooks, marine waiters, marine engineers, marine firemen, and you are not—dues book is not up to date. There's something liable to happen."

Q. Now, you also testified on cross examination by Mr. Bahrs that the company called you on October 7, 1948 and offered you an assignment, is that correct? A. For two days only.

Q. What type of assignment did they offer you?

A. Industrial work. I was not assigned to it. I was never on industrial work.

Q. Could you explain to me, so the Trial Examiner will understand, the difference between industrial and——

(Testimony of John P. Conners.)

A. On industrial work you get ninety cents an hour. Waterfront work you get a dollar twenty. On industrial work you [190] didn't have to belong to the union, and waterfront work you did.

Trial Examiner Myers: Industrial work means guarding an office building?

The Witness: Yes. Plants. You punch clocks and stuff like that. You have to guard something individual, like they had out in the yard or something like that.

Q. (By Mr. Magor): Who was it you were talking to on October 7th?

A. Lieutenant Jamison.

Q. What did he say when he offered you this job for a couple of days?

A. He says, "It's for two days only," he says, "two twelve hour shifts." "Well," I says, "I've got something lined up, and I think I have got a steady job, and I don't wish to take it at the present time," because I expected to go to work that Monday.

Trial Examiner Myers: And he called you when?

The Witness: That was on a Saturday—Friday night.

Trial Examiner Myers: And you would have had work for Saturday and Sunday?

The Witness: Well, I'd have to work twelve hours Saturday, and then twelve hours Sunday, see.

* * * * * [191]

(Thereupon the document above-referred to was marked General Counsel's Exhibit No. 7, in evidence.) [194]

GENERAL COUNSEL'S EXHIBIT No. 7

[Letterhead of International Longshoremen's & Warehousemen's Union]

To All Pinkerton Guards July 7, 1948

Dears Sirs and Brothers:

In order to dispel some of the confusion among the membership I am writing each member regarding the following:

1. The coastwide agreement between the ILWU-CIO and the Pinkerton Agency has been extended until June 15, 1949 by mutual agreement between the Company and the Union, and all of its terms and conditions are in effect and full force until that date. Anyone who tells you any different is just a plain liar and is only doing so to break down your union—the union that raised your wages $4.00 a day in two years.

2. The membership in regular meeting voted unanimously that all members wear their union buttons on the job and carry their union books, or be cited to appear before the Executive Board.

3. The membership voted unanimously that the fines for being delinquent in dues be enforced. Starting July 9 these fines will be in effect and delinquents will be dealt with according to the agreement.

4. Anyone having any difficulty on the job should immediately contact the steward or some member of the Grievance Committee. They are: L. L. Johnson, William Prevot, Joseph Costa and B. James.

5. It has come to the attention of the officers and

the Executive Board that some members have been misled into signing cards with the phoney Independent Union and also were misled by Sgt. Fox, who was playing along with said renegade union and who was fired by Pinkerton for doing so. These members should straighten up and fly right and help build this union, otherwise they will be cited before the Executive Board.

6. The vacation provision of the agreement provides that each guard receives one weeks' vacation after one year's employment and two weeks after two years. It's just that simple. No other requirement.

7. You may mail your dues to the office by check, postal note or money order. The office is open from 12 noon to 4:00 p.m. daily for the same purpose.

8. The phoney Independent Union has been decertified by the National Labor Relations Board upon their action by charges filed by us and they no longer represent any guards. The same government board also has dismissed charges filed by Thomas Stenhouse against our union for having him fired from Pinkerton, thereby proving him a renegade and a traitor to this union.

9. The regular membership meetings are held on the first Monday of each month, at 11:00 a.m. and 7:30 p.m. at 90 Market Street. We urgently request that you attend so that you may know what is going on and to take part in running your own union.

Fraternally yours,

/s/ MICHAEL JOHNSON,
Organizer.

WALTER J. SLATER

a witness called by and on behalf of the General Counsel National Labor Relations Board, being first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination

Q. (By Mr. Magor): Mr. Slater, were you ever in the employ of the Pinkerton's National Detective Agency? A. Yes sir. [215]

Q. When were you first employed by the company? A. October 1, 1946—1946.

Q. And what position were you hired as?

A. A waterfront guard.

* * * * *

Q. Were you a member of any labor organization when you [216] first went to work for Pinkerton's?

A. I was informed there was one——

Trial Examiner Myers: Now, were you a member of any labor organization when you first started? A. When I first started, no sir.

Q. (By Mr. Magor): Well, after you entered Pinkerton's employ, did you become a member of any labor organization? A. Yes sir.

Q. When did you become——

A. October 15, 1946.

Q. What labor organization did you join at that time? A. I.L.W.U., No. 34.

Q. Did you continue to be a member of that labor organization during the time you worked for Pinkerton's?

(Testimony of Walter J. Slater.)

A. Up until—up until the last dues I paid was May of 1948. [217]

* * * * *

Q. Now, after you—you say that you last paid your dues in May, 1948. Did you hear from the union at any time after that? A. Yes sir.

Q. When did you hear from the union?

A. Some time about the 20th to the 25th of July. My phone rang, I answered the phone and the party answering says, "This is Michael Johnson," who I recognized the voice. He says, "Unless you get over here and pay some dues, you are not going to work," and I made the remark, I says, "Who the hell do you think you are?"

Q. What did Mr. Johnson say?

A. He says, "If you don't get over here and pay some dues, I'll show you." He says, "Now, I'll give you until Thursday to get over here and pay them dues, or you don't work." [220]

* * * * *

Q. Did you see anybody from the company after this call Mr.——

A. I contacted the company and told them what had——

Trial Examiner Myers: Wait a minute. Wait a minute.

Q. (By Mr. Magor): No, when did you contact the company?

A. Well, I wouldn't say whether it was that same day or the next—the next morning—it was in

(Testimony of Walter J. Slater.)

that—one of the two. Either the same day or the next morning.

Q. It may have been—from the 20th to the 25th, the day after that, or the same day?

A. Yes sir.

Q. Who did you contact from the company?

A. As I recall, it was Mr. O'Neal.

Q. Did you identify Mr. O'Neal, what his position was in [221] the company?

A. He was the dispatcher.

Q. What did you have to say to Mr. O'Neal?

A. I told him of the conversation that had taken place between myself and Mr. Johnson, and he says, "I have no comment at this time."

* * * * *

Q. Now, you say on or about August 6th you were working on the Marine Lynx?

A. Yes sir.

Q. Was there any picket line there at that time?

A. No sir.

Q. Did you see anybody from the company on that date?

A. After I had finished my shift that day, I went to the telephone and called the dispatcher to get an assignment for the next day, and he made the remark—— [222]

Trial Examiner Myers: Who was the dispatcher?

Q. (By Mr. Magor): Who was the dispatcher you were talking to, now?

A. Mr. O'Neal. He made the remark, "Don't

(Testimony of Walter J. Slater.)

you know that we have got a strike on here on account of you fellows?"

Q. What did you have to say to him?

A. I said, "No sir, I do not." And he—then he told me, he says, "I will have to call you back later, Slater." [223]

* * * * *

Q. (By Mr. Magor): Now, do you—you say that Lieutenant Jamison called you up on August 7th or sometime thereabouts and offered you an accommodation assignment, is that correct?

A. Yes sir.

Q. Where was that assignment?

A. It was down—at the Pacific Can Company at 154th Avenue in Oakland.

Q. Did you ask Lieutenant Jamison at that time about your job on the Marine Lynx?

A. Yes sir.

Q. What did he have to say to you?

A. He says, "I have no comment at this time. Conditions are such that we don't know what's going to happen." [224]

* * * * *

Q. One day. And after that, did you receive calls from the company? A. No sir.

Q. Did you go over to see the company at any time?

A. I contacted them many times by telephone.

Q. You called one time after this that you contacted them to the best of your recollection, Mr. Slater?

(Testimony of Walter J. Slater.)

A. Well, I daresay that I called them the next day and asked for an assignment, and he says, "Until this strike is settled, we cannot give you any information."

Q. Who were you talking to at that time?

A. The dispatcher, Mr. O'Neal. [225]

* * * * *

Q. (By Mr. Magor): Now, after this, Mr. Conners, did you go down and see the company at all—the company contact you?

A. You said Mr. Conners.

Q. Mr. Slater, I beg your pardon.

A. Will you repeat the question, please?

Q. After this, subsequent to the call you made to the dispatcher, at any time after that, did you go to the company, or did the company call you and dispatch you to a job?

A. They—along about—I'd say the middle of August, I called on the telephone and asked to take an assignment as a detainee watch at Pier 41 in San Francisco.

Q. Who made this call, and what time was it made?

A. Oh, I just couldn't recall the exact time. I'd say that it was somewhere after lunch.

Q. Who were you talking to at that time?

A. The dispatcher.

Q. He called you up, is that correct.

A. Yes sir. [226]

Q. Do you know what the dispatcher's name was, or who he was?

(Testimony of Walter J. Slater.)

A. Well, I wouldn't say positive whether it was Mr. O'Neal or Mr. Bishop. It was one of the two.

Q. What did you have to say to the dispatcher at that time?

A. I asked him if I may talk to Mr. Camden.

Q. What did he have to say?

A. And after some delay, they switched me to Mr. Camden, and I asked Mr. Camden if he thought it would be advisable for me to take that assignment at Pier 41, when conditions were as they were, and he says, "No, Slater. I don't think it would be advisable. I thank you for calling me, and I will have you released from this assignment, and I will call you back later and talk to you."

Q. Now, when you told him that, what did you mean by "conditions the way they are"?

Mr. Leonard: Objected to on the ground it is incompetent, irrelevant and immaterial, and calls for the opinion and conclusion. He stated the conversation——

Mr. Magor: I submit, Mr. Trial Examiner, it is the state of mind of the witness when he can testify to——

Mr. Leonard: Not binding on us.

Trial Examiner Myers: Well, I will sustain the objection.

Q. (By Mr. Magor): Well, after this talk with Mr. Camden, you subsequently after this, did you—were you assigned by [227] the company to any job? Did Mr. Camden call you back?

A. No sir.

(Testimony of Walter J. Slater.)

Q. Did you receive a call from the dispatcher at any time? A. A short time after this——

Trial Examiner Myers: Well, how—can't you fix the time?

The Witness: Well, I couldn't.

Trial Examiner Myers: Well, was it a day, a week, month?

The Witness: Well, approximately a week or ten days after this, I'd called again and told to take an assignment at Pier 44.

Trial Examiner Myers: Who called you?

The Witness: The dispatcher.

Trial Examiner Myers: Who?

The Witness: Mr. Bishop, I believe it was.

Q. (By Mr. Magor): When was this call, to the best of your recollection; was it in August or September? A. In August.

Q. It was in August.

A. In August, along about—oh, the middle or say approximately the 20th of August, somewhere in that neighborhood.

Q. And what did you say to the dispatcher at that time?

A. I asked the dispatcher if he thought that I should take this assignment when conditions were as they were. He says, "Come over, I want to talk to you. Get hold of Mr. Conners, [228] and the both of you come over." So, Mr. Conners and I both came over and I telephoned from the Terminal Building in San Francisco.

Q. Who did you call? A. The dispatcher.

(Testimony of Walter J. Slater.)

Q. What time was this?

A. Approximately 1:30 to 2:00 o'clock.

Trial Examiner Myers: What did you have to say? What is Mr. Conners' first name?

The Witness: John.

Trial Examiner Myers: Is that the gentleman that testified this morning?

The Witness: Yes sir.

Q. (By Mr. Magor): What did you have to say to the dispatcher at this time?

A. We asked the dispatcher if he thought we could take this assignment when conditions were as they are. He says, "Well, if you will go down to 90 Market Street and ask Mr. Michael Johnson, he will give you a clearance to go through the picket line."

Q. And you say that was sometime the latter part of August? A. Yes sir.

Q. You might be mistaken?

Mr. Leonard: Now, wait a minute. I will object to that as being leading and suggestive and seeking to impeach his own witness. [229]

Trial Examiner Myers: Overruled. Go ahead.

Q. (By Mr. Magor): Did you go down and see Mr. Johnson at that time? A. Yes sir.

Q. And what time did you get down to see Mr. Johnson?

A. I'd say around about 2:30—2:35. I did not look at my watch for exact time.

Q. And what did you have to say to Mr. John-

(Testimony of Walter J. Slater.)

son; was anybody else present besides you and Mr. Slater? A. Mr. Connors.

Q. Mr. Connors.

A. No sir. There was no one else present.

Q. What did you say to Mr. Johnson?

A. We asked Mr. Johnson if he would give us a clearance to go through the picket line to—for this assignment. After he meditated for a couple of minutes, he says, "I think you have got a hell of a crust to come down and ask for such a thing." Then after he meditated a few minutes more, he says, "I don't know whether I will give you one or not, but if I do give you one, I'll not be responsible for what will happen to you." He says, "The men all know you fellows, and," he says, "you go down there, you will have to present your book, and," he says, "I won't be responsible for what will happen." Then he meditated possibly three or four minutes and he says, "I will go out and make a telephone call." Mr. Connors and I [230] sat there approximately thirty or forty minutes. Mr. Johnson did not come back to his office. So, we became discouraged, and disgusted, and walked out. When we came out from his office, we see Mr. Johnson sitting at a stool in the saloon, but—I might add there, while we were sitting there waiting for Mr. Johnson, a man in a Pinkerton uniform came in to Mr. Johnson's office—the man, I don't know—and says, "What the hell are you fellows doing here?" Mr. Connors spoke up and says, "I don't consider that as any of your business," he says, "Well, I'm one of the committee-

(Testimony of Walter J. Slater.)

men, and I figure it is." And that was about all that was said. And as I say, we sat there for approximately thirty or forty minutes. Mr. Johnson did not come in, and we walked from there on up to the National Labor Relations Board.

Q. Well, after this contact with Mr. Johnson, did you receive any calls from the company, or did you go back and see the company?

A. No sir. I have never heard any more from them.

Q. That was the last time? A. Yes sir.

Q. You didn't contact the company after seeing Mr. Johnson? A. No sir.

Q. Did the company contact you?

A. No sir.

Mr. Magor: I have no further questions at this time. [231]

* * * * *

Redirect Examination

Q. (By Mr. Magor): Mr. Slater, I have this affidavit made on the 17th day of September, 1948, and ask you if that is your signature? (Exhibiting paper.) [247]

A. Yes sir, it is. [248]

* * * * *

Q. (By Mr. Magor): After looking at this affidavit, Mr. Slater, would you say that this is a more correct statement of the times and events other than the previous testimony?

A. Yes. As a matter of fact, I know that this is the correct statement. [250]

* * * * *

(Testimony of Walter J. Slater.)

Trial Examiner Myers: I will sustain the objection. I assume, Mr. Bahrs, that you will object to it too?

Mr. Bahrs: Yes, we do.

Trial Examiner Myers: The objection is sustained. You may have it marked a rejected exhibit, if you so desire.

Mr. Magor: No, it is not necessary.

Q. (By Mr. Magor): After referring to that affidavit, Mr. Slater, would you say that September 16th you went down——

Mr. Leonard: Objected to as leading and suggestive.

Trial Examiner Myers: Overruled. What is the answer. [251] After referring to this statement of September 16th. What?

Q. (By Mr. Magor): And then referring to this affidavit, can you give me the correct date on which you went down to see Mr. Johnson after being assigned to pier 44.

A. I say that affidavit——

Trial Examiner Myers: Well, now, wait. And after you read it, what is the date, if you know? Does that affidavit refresh your recollection as to when you went down to see Mr. Johnson?

A. Yes, sir.

Trial Examiner Myers: When did you go down to see him? It is September the 16th, is it not?

Mr. Magor: Do you need to refer to the document again, Mr. Slater?

Trial Examiner Myers: Show it to him.

(Testimony of Walter J. Slater.)

(Whereupon Mr. Magor exhibits document to the witness).

A. September the 16th, 1948 is the correct date.

Mr. Leonard: I move to strike that on the ground there was no pending question, and I object to his testifying. It is apparent he has no recollection of this document.

Trial Examiner Myers: Overruled.

Q. (By Mr. Magor): You say that September 16th is the correct date?

A. Yes, sir. [252]

Q. And the previous conversation you had with Mr. Michael Johnson took place at that time?

A. Yes sir.

Mr. Leonard: Objected to as leading and suggestive.

Trial Examiner Myers: Overruled.

Q. (By Mr. Magor): After going down to see Johnson, did you go back and see the company at any time? A. The picketing company?

Q. That's correct.

A. Not personally, no sir.

Q. Did you call? A. Yes sir.

Q. Who were you talking to, and when was it?

A. The dispatcher.

Q. Was this after you talked to Mr. Johnson?

A. Yes sir.

Q. What time was it?

A. Well,—I would call about 9:00 o'clock of a morning.

(Testimony of Walter J. Slater.)

Trial Examiner Myers: On what date did you call?

The Witness: The next day.

Trial Examiner Myers: September the 17th?

The Witness: September the 17th.

Q. (By Mr. Magor): Had you called him previously after talking to Mr. Johnson?

A. Had you called—— [253]

Q. After talking to Mr. Johnson, did you call the company?

A. Yes, sir, on September the 17th.

Q. What did you have to say?

A. I asked them if they had an assignment for me.

Q. What was the response of the company?

A. They said, "no."

Q. Did you tell them that you had been down to see Mr. Johnson? A. Yes, sir.

Q. And did you tell them what occurred while you were talking to Mr. Johnson? A. I did.

Q. What did the dispatcher have to say for that?

A. He wouldn't—he said he had no comment to make.

Q. Did he ask you to take the assignment on pier 44?

A. When he first called me he did.

Q. Did he ask you after you had talked to Mr. Johnson to take that assignment? A. No, sir.

Q. What did he say about the assignment?

A. He said that I would be excused.

Q. Now, when you were being questioned by Mr.

(Testimony of Walter J. Slater.)

Leonard, you testified that you—during July, that you were working on various ships, is that correct?

A. Yes, sir. [254]

Q. That was all waterfront work, is that correct?

A. Yes, sir.

Q. You were working on the waterfront work up until the 7th day of August, is that right?

A. Until I took that one shift, 12-hour shift, at the Pacific Can. The rest of it was waterfront work.

Q. And since that one shift at the Pacific Can was August 7th, you have never been called to take any assignment on waterfront work, is that correct?

A. Well, that Pacific Can was in August.

Q. That is what I say. August 7th.

A. August 7th. And I was dispatched on—if I recall it correctly, on—on August the 10th at 8:40 p.m. Mr. Bishop called on the phone and gave me an assignment at pier 41, San Francisco, 4:00 p.m. to 11:59 p.m. as a detainee watch.

Q. And did you—what did you say to Mr. Bishop at that time?

A. At 9:30 a.m. I called on the telephone and asked to speak to Mr. Camden. The operator wanted to know who was calling, and I told her——

Q. And did you speak to Mr. Camden?

A. And then Mr. Camden came on the telephone and I spoke to Mr. Camden, whose voice I recognized, and I told him of this assignment, and he thanked me for calling him and said he did not think it would be advisable for me to take that [255] assignment. And that he would release me from the

(Testimony of Walter J. Slater.)

assignment and call me back later and talk to me.

Trial Examiner Myers: Did he call you back later?

The Witness: No sir.

Q. (By Mr. Magor): And other than the assignment on Pier 44, in which you had to see Mr. Johnson to get a clearance for, you have never received any call from the company assigning you to waterfront work? [256]

* * * * *

CHARLES L. HOLMES

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name, sir?

The Witness: Charles L. Holmes.

Trial Examiner Myers: Will you spell the last name for the record?

The Witness: H-O-L-M-E-S.

Trial Examiner Myers: Where do you live, Mr. Holmes?

The Witness: 228 - 13th Street, Richmond, California.

Trial Examiner Myers: You may be seated. The General Counsel may proceed with the examination of this witness.

Q. (By Mr. Magor): Mr. Holmes, were you

(Testimony of Charles L. Holmes.)

ever in the employ of the Pinkerton's National Detective Agency? A. Yes sir.

Q. When were you first employed by the company? A. 13th of June, 1946.

Q. And at that time what position were you hired as?

A. I hired out as a guard or patrolman to guard ships and docks.

Q. At the time you first went to work for the company, in June 13, 1946, were you a member of any labor organization? [268] A. I was.

Q. What labor organization?

A. Marine Engineers Beneficial Association.

Q. And after working for the company, Pinkerton's, did you join any other labor organization?

A. I did after about a month.

Q. What labor organization did you join at that time?

A. The—a sort of a—a guards and patrolmen's outfit, affiliated with the Local 34, or something or other. I haven't got the book. That was taken away from me by this gentleman over here. (Indicating) I haven't got the data on that.

Q. Who are you indicating?

A. Mr. Johnson.

Q. And during the time that you first commenced employment for the company, did you work steadily as a guard, guarding ships?

A. Yes. Quite steadily.

Q. Did you continue to pay dues to the labor organization, Local 34, that you joined?

(Testimony of Charles L. Holmes.)

A. Pardon?

Q. Did you continue to pay dues to Local 34 after you joined that labor organization?

A. I did, yes.

Q. When was the last time you paid dues to them? [269]

A. The date I paid dues, I can't remember, but I was paid up until the first of June, 1948.

Q. You were paid up until the first of June, 1948? A. Correct.

Q. And did you receive any notice from the union to pay your dues after that?

A. None whatsoever.

Q. Were you working for the company in August 7, 1948? A. Yes sir.

Q. What ship were you assigned to at that time?

A. On the Marine Lynx most of the time.

Q. On August 7th, 1948, were you working on the Marine Lynx?

A. Yes sir. That is the last day I worked on the Marine Lynx.

Q. How long have you been working on the Marine Lynx? A. About six months. [270]

* * * * *

Q. (By Mr. Magor): Now, what happened on August 7th, 1948; did you see——

(Testimony of Charles L. Holmes.)

A. On August the 7th, at about five in the afternoon, I called the office, I believe, and I got an assignment for the next three days, or four days, something like that. Usually a day. Three or four days at the time. At about seven o'clock that evening I got a call from the office, and the dispatcher told me, he says, "I am sorry, Holmes, but you can't go to work tomorrow," and I said, "Why?" And he said, "Michael Johnson just handed us a list of men that can't go to work, and your name is on the list." [271]

* * * * *

Q. And after that you received the call from the dispatcher?

A. About seven o'clock. A couple of hours later.

Q. What did you do after that, Mr. Holmes?

A. Well, the next day was Sunday, the 8th of August, I believe it was, and the 9th of August in the morning, I went to the postoffice about nine o'clock and acquired a money [273] order for $5.00 and sent it to Michael Johnson, 90 Market Street, San Francisco, with my book and a note that it was for the months of July and August, I believe, or June and July, rather. Two dollars and fifty cents for each month.

Q. And did you receive any reply to that letter, Mr. Holmes?

A. I received the letter back a couple of days later. My letter had been opened, the book taken

(Testimony of Charles L. Holmes.)

out, the money, my note was intact, the whole thing put in a large envelope and sent back to me without any note of explanation of any kind.

Q. Well, after that did you talk to the company?

A. After I sent the money order on Monday evening.

Q. Did you tell the company that you sent the money order?

A. I called the money—called the company up in the evening about five.

Q. Who were you talking to at that time?

A. The dispatcher on duty. I can't remember who it was.

Q. What did you have to say to him?

A. I told him that I had sent $5.00 over to Michael Johnson and the money was in the mail, and I said, "I imagine you can take my word for that. Will it be all right for me to go to work tomorrow?" He said, "No. We can't do that. Not until we get an O.K. or something similar to that from Michael Johnson." I remember I argued with him, it cost me a nickel over time. But the final thing he said, "Holmes, I am just working here the same as you are." [274]

* * * * *

(Whereupon the documents above referred to were marked General Counsel's Exhibit Nos. 9-A, 9-B, 9-C and 9-D, and received in evidence.)

(Testimony of Charles L. Holmes.)

GENERAL COUNSEL'S EXHIBIT No. 9-C

Oakland, Calif., 8-9-48

Mr. Michael Johnson,
90 Market Street, San Francisco, Calif.

Enclosed please find money order in the amount of $5.00 for the months of June and July of this year.

/s/ C. O. Holmes
412 8th St., Oakland, Calif.

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* * * * *

Cross Examination

Q. Did you do any work for Pinkerton's for the week ending August the 7th? A. Yes.

Q. Will you state what work that was?

A. On August the 7th I was on the Marine Lynx eight to sixteen hundred, Q.P., that's for quarter patrol.

Q. Did you work the full week?

A. I had forty hours that week, the week ending August the 7th. [279]

Q. Did you do any work for Pinkerton's on the week ending August the 14th? A. Yes sir.

Q. Did you work the full week?

A. No sir.

Q. How much work did you do?

A. I got two eight hour shifts on Wednesday, the 8th, Polk, eight to fifteen hundred.

Q. Pardon me. On Wednesday, the 11th, what was that? A. President Polk.

(Testimony of Charles L. Holmes.)

Q. Where was that?

A. That I haven't marked down.

Q. Was it waterfront work?

A. Oh, naturally. President Polk is one of the passenger ships. On Saturday, on the President Taft, that is——

Q. That was on the 14th?

A. On the 14th, that is correct. That is sixteen hours for that week.

Q. All right. Those were both waterfront shifts for that week, is that correct?

A. Well, ships don't sail on land, my boy—pardon me. I mean to say, they are waterfront jobs.

Q. They are waterfront jobs. You tell us what you did on the week ending August the 21st.

A. Yes sir. I called up Mr. Jamison some time the later [280] part of the week ending the 14th, and I told him that I had a vacation coming, and I says, "I may as well take it now, if possible, and while I'm doing that, the smoke might clear away and things will get squared away so we can come back to work." He said, "Very well. You go on vacation Sunday, the 15th."

Q. Did you take your vacation on the week ending August the 21st?

A. I went on vacation on Sunday—on Sunday, rather, that is four zero, Sunday morning.

Q. Sunday what?

A. Sunday, the 9th of August.

Q. From Sunday, the 9th of August until August the 21st, were you on vacation?

(Testimony of Charles L. Holmes.)

A. No. Up and to and including the 28th of August, I was on vacation.

Q. You were on vacation——

A. Fourteen days.

Q. Fourteen days. With pay, is that correct?

A. That is correct.

Q. And that pay was given to you by Pinkerton's, is that correct? A. Naturally.

Q. It was waterfront vacation pay?

A. Yes. And in addition to that I was asked to work two days on that week ending August 28th, and I was on the vacation, [281] I told him that over the telephone, that I was on my vacation, I had to be home. He said they were shorthanded and wished I would take it, and I said, "That being the case, very well." In other words, on Friday, the 27th of August, I worked eight hours on the Marine Lynx, and on Saturday, the 28th, seven hours. That is special cargo of some sort at Pier 40.

Q. The 27th you worked on the Marine Lynx?

A. That is correct.

Q. Pardon me? A. That is correct.

Q. And on the 28th at Pier 40, is that correct?

A. That's right.

Q. Now, do you know the date the waterfront strike started?

A. I believe it was some time in the first part of September. That is, the stevedore strike.

Q. That is right. The stevedore strike. After you worked on these two ship assignments on the 27th and 28th, can you say whether you returned to

(Testimony of Charles L. Holmes.)

work for the company before or after the waterfront strike was in progress?

A. When I come off of duty that Saturday, the 28th, off of Pier watch—Pier 40—that was the last time that I worked on the waterfront job to date.

Q. That is correct. Now, can you tell us when—whether or not there was a waterfront strike in progress at the time [282] you returned to work after the 28th?

A. I never returned to work on the waterfront after the 28th.

Q. Oh, no, I mean, returned to work for Pinkerton's. When did you next report to work for Pinkerton's?

A. Well, here we skipped something there on the 28th. My vacation ended, and I notified Pinkerton's by telephone. I got Captain Sledge on the telephone and that was some time in the afternoon about one o'clock, and he said, "This is Sledge." And I said, "Well, my vacation ends tonight at midnight, and I thought I'd notify you about it." I said, "The vacation was a howling success, remember, and I thought I'd let you know that I am ready to go to work. As a matter of fact, I am raring to go." He says, "That's fine, Holmes, I will put you on the list." And he gave me that cargo watch. That was a swing shift job.

Q. What was that, the 28th, you say?

A. Yes. That one I just mentioned, the seven hour watch.

Q. Cargo watch?

(Testimony of Charles L. Holmes.)

A. It says here "Special cargo, Pier 40."

Q. What work did you do after——

A. I—after that I called them for seven consecutive days anywhere from five to seven in the evening. Thought I'd better tell them about getting a job. I quit calling them the 4th day of September. [283]

Q. Did you do any work for Pinkerton's after the 4th day of September? A. Yes sir.

Q. Would you please tell us what it was?

A. I will. Some time, that is, two or three days prior to the 17th day of September, I called Mr. Jamison. I told him that "apparently I can't go to work on the waterfront, as things are. So, if you have a commercial job that's worth while I will take one until the trouble gets squared away." He said, "I will see what I can do." And he called up a day or two later and got me a commercial job, and that commercial job was all right for a couple of weeks, but it turned out to be part time. So, the result of that was that the past—the last three weeks on that job I found it necessary for me to work two eight hour shifts in one day on two separate jobs at ninety cents an hour to get a part time job. As a matter of fact, the last week was thirty-eight hours and a half, thirty-five, fifty-five gross, fifty-six, thirty-seven net after working a thirteen and a half hour shift in one day. So, I told Jamison that wouldn't do. I says, "If that's the best you can do, we'll have to call the whole thing off."

Q. When did this conversation take place?

(Testimony of Charles L. Holmes.)

A. The first conversation took place on the Tuesday, the 9th, the day I worked fifteen and a half hours.

Q. The 9th of what month? [284]

A. November.

Q. November?

A. That's right. And I said, "You will have to figure out something better for next week." And Saturday afternoon I called him up, I said, "Well, Jamison, what have you got figured out for next week?" Well, he apparently hadn't figured out anything. So, I said, "I'm afraid we'll have to call the whole thing off, if that's the best you can do." So, he says, "Well, that's up to you." I says, "Very well, I will bring in my equipment Monday," which I did.

Q. Pardon me. You said what?

A. "Monday." My equipment. Uniform and stick and gun, et cetera.

Q. You turned in your equipment, did you say?

A. Yes.

Q. What date was that?

A. On Monday, the 15th of November.

Q. Do I understand you to say that you quit the job on November the 15th?

A. Absolutely, correct. For that reason that I wasn't earning enough, and I was kicked about a little too much. I explained that matter to Mr. Sledge there in the office. As a matter of fact, he asked to see me before I left. He says, "What seems to be the trouble, Holmes?" And I told him briefly

(Testimony of Charles L. Holmes.)

what happened, and I says, "You understand those conditions. [285] Do you blame me for pulling out?" And he said, "No, I don't think I can." And that was the end of that. [286]

* * * * *

Cross Examination

Q. (By Mr. Leonard): During the week ending the 14th of August, you worked two waterfront jobs, is that right; the 14th of August, 1948?

A. The week ending what?

Q. August 14th. A. That's correct.

Q. On piers in San Francisco, is that right?

A. I don't know what piers they were. [289]

* * * * *

Q. (By Mr. Leonard): When did you get your first waterfront job?

A. After the 7th of August.

Q. That's right.

Trial Examiner Myers: Well, when?

A. On the 11th, it was.

Q. (By Mr. Leonard): On the 11th. All right. How did you get that job? [293]

A. They called me up.

Q. You were dispatched in the ordinary course of events? A. That's correct.

Q. Just the way you have been dispatched to jobs before? A. Uh-huh. [294]

* * * * *

Re-direct Examination

Q. (By Mr. Magor): Mr. Holmes, after the last time that you were working for the company, I be-

(Testimony of Charles L. Holmes.)

lieve you testified around November 13th.

A. Yes.

Q. Have you at any time received any calls from the company? A. Yes—on the——

Q. When did you receive the call from——

A. On December 17th—18th. Some time in the afternoon, [296] I received a call from Jamison. He identified himself as Jamison.

Q. What did he have to say to you at that time?

A. He said, "This is Jamison," and he said—we had—this conversation was something similar to this: "The business agent says it's all right with him, and you are all right with us, always have been for that matter, so we'd like to have you come back on the waterfront. All you have to do—if you—" he says—"All you have to do is square yourself with the union, or if you square yourself with the union."

Q. "If you square yourself with the union, come back to work on the waterfront."

A. That's right. That is as near as I can recall, that was the conversation.

Q. What did you have to say to this?

A. I declined. I told him that I had flimflammed too much to consider coming back. At that time I had the days filed with the Labor Board. So——

Q. Was that call received after you filed a charge with the Board? A. That's right. [297]

* * * * *

(Testimony of Charles L. Holmes.)

Direct Examination

Q. (By Mr. Magor): Mr. Holmes, when you were cross examined by Mr. Bahrs yesterday, you testified that on or about August 11 you were assigned to the President Polk; is that correct?

A. I will consult my book here. If I said so, it must be right. On August 11 I was assigned to the President Polk, [308] that is correct.

Q. On August 14 you were assigned to the President Taft? A. That is correct also.

Q. Now, when you were assigned to those ships were you asked by the company to get a clearance?

A. No, they never mentioned anything like that to me.

Q. They never told you that you had to get a clearance? A. No.

Mr. Magor: No further questions. [309]

* * * * *

PHILIP C. SLEDGE

a witness called by and on behalf of the Pinkerton's National Detective Agency, Inc., Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name, sir?

The Witness: Philip C. Sledge.

(Testimony of Philip C. Sledge.)

Trial Examiner Myers: Where do you live, sir?

The Witness: 725 Ellis, San Francisco.

Trial Examiner Myers: You may be seated. Mr. Bahrs, you may proceed with the examination of this witness.

Q. (By Mr. Bahrs): Will you state for the record, please, what position you occupy?

A. Superintendent of Patrol of the San Francisco Office of the Pinkerton National Detective Agency.

Q. I will ask you, Captain Sledge, on or about August 11, did you dispatch, or offer employment to Mr. Conners or Mr. Slater on the detainer watch on the San Francisco waterfront?

A. To both Mr. Slater and Mr. Conners, sir.

Q. That was on August 11?

A. August 11.

Trial Examiner Myers: What year?

The Witness: 1948, sir.

Mr. Bahrs: 1948, yes.

Q. (By Mr. Bahrs): As a part of that offer of employment or dispatching, did you request them to go to the Contract Guard's and Patrolmen's Committee, or to Mr. Mike Johnson here for clearance?

A. No, I didn't. [315]

Q. Were there any conditions attached to the offer of employment? A. None whatsoever.

Q. Now, did Mr. Slater accept that offer of employment? A. He did not, sir.

Q. Did Mr. Conners? A. No, sir.

Q. On or about the middle of August, did you

(Testimony of Philip C. Sledge.)

have a conversation with Mr. Slater during which time Mr. Slater made any reference to taking a trip out of town, sir?

A. I did, sir. Mr. Slater called at our uptown office in the Monadnock Building and talked with me in my office. As I recall, he stated that some relative—I believe a son—had flown here, and I think was flying to New York, either in his own plane, or at least a plane which he piloted. That, as I recall it, was approximately the middle of August. I am not sure of the exact date.

Q. When was the next time you saw Mr. Slater?

A. In September, sir, approximately the 10th or 12th of September.

Q. What conversation did you have with him at that time?

A. Mr. Slater again came into our San Francisco Office and told me about his trip to New York. He said that he had had a very good time and mentioned a few incidents that happened. It was just a general conversation. [316]

Q. Did he make any request for employment at that time? A. No, sir.

Q. I will ask you whether or not on or about September 16 you dispatched Mr. Slater to an assignment?

A. Yes, sir. We gave Mr. Slater an assignment at that time to a bulkhead watch in front of Pier 44 there, 6:00 a.m. to 2:00 p.m., on the 16th. On the seventeenth. The assignment was given to him on the day of the 16th. Mr. Slater at that time stated

(Testimony of Philip C. Sledge.)

that he was unable to accept the assignment because he could not get union clearance.

Q. Now, Captain Sledge, you are familiar with the contract that is in effect between the Contract Guards and Patrolmen and the Pinkerton's National Detective Agency? A. I am, sir.

Q. I would like to read Paragraph (d) on Page 6 of the contract. I presume it is satisfactory if I read from the copy. It reads as follows: "This agreement recognizes the refusal of watchmen to pass through picket lines established by a labor organization at or around the premises of the clients of the employer under this contract, and such action shall not be deemed a violation of the agreement."

Paragraph (e) reads as follows: "It is recognized that protection of property is necessary during a strike. It is, therefore, agreed that when mutually approved by the union involved and the employer, watchmen covered by this agreement [317] will be permitted to pass through picket lines, provided strikebreakers are not used."

When reference was made to securing a permit to go to work on the waterfront, I will ask you whether or not at that time there was in effect a general strike of longshore and maritime crafts on the waterfront at that time?

A. There was, sir.

Q. Were the picket lines established?

A. Yes, sir.

Q. Was there a Strike Committee operating,

(Testimony of Philip C. Sledge.)

consisting of representatives of the various unions that were on strike at that time?

A. I understand that there was such a committee.

Q. In order for a Pinkerton guard to go through the picket lines, it was necessary to secure a permit from that Strike Committee?

A. We were informed that all Pinkerton men would have to obtain permits from this Strike Action Committee, as I believe it was called.

Q. You heard the testimony here yesterday and the day before of the various other unions involved, that is, the Marine Cooks and Stewards, the Radio Operators, and so forth, and those were the unions that were represented on that Strike Committee, to your knowledge? A. That is true. [318]

Q. I will ask you whether or not on or about October 4 you offered Mr. Slater a job?

A. Yes, sir, I did.

Q. Will you please tell us what that offer consisted of?

Trial Examiner Myers: Including that date?

The Witness: The offer was made to Mr. Slater on October 4, 1948. I personally telephoned Mr. Slater and told him that we had a new job opening on his side of the Bay; that it was an industrial job at the San Lorenzo Village, a construction project which we had been informed would last anywhere from six months to a year; that it would be steady employment, not only at the industrial rate of 90 cents, but at a rate of $1.50 an hour, with, of course,

(Testimony of Philip C. Sledge.)

time and a half after 40 hours. His schedule would be a 48 hour week, which would give him a gross check of $62. I told Mr. Slater that he might have the job if he so desired.

Q. What did Mr. Slater do?

A. Mr. Slater informed me that he had a job at Moore's and expected to turn in his uniform in a few days. By "Moore's", I assume that he meant Moore's shipyard.

Q. Captain Sledge, you have heard various witnesses here refer to a certain list that was prepared by Mr. Johnson, consisting of the names of persons whose dues had not been paid up in the Contract Guards' and Patrolmen's Union?

A. I have, sir. [319]

Q. In the first place, did you ever see that list?

A. I did, sir.

Q. Do you know whether or not any persons, other than Mr. Connors or Mr. Slater, or Mr. Stenhouse, or Mr. Holmes, were named on that list?

A. Yes sir, there were a number of those. [320]

* * * * *

Cross Examination

Q. (By Mr. Magor): You say that on September 16th you dispatched Mr. Connors and Mr. Slater to the bulkhead watch; is that correct?

A. (There was no answer.)

Q. To refresh your memory, what did you dispatch him to on September 16?

(Testimony of Philip C. Sledge.)

A. I don't recall any mention being made of Mr. Connors. Mr. Slater was dispatched to the bulkhead watch, sir, Pier 44, from 6:00 a.m. to 2:00 p.m.

* * * * * [328]

Q. I see. You testified that the unions brought around a list of men who were delinquent in their dues?

A. We were given a list of men who were delinquent, yes, sir.

Q. Slater's and Connors' and Holmes' names were named. Right?

A. I believe so, sir. [329]

* * * * *

J. O. CAMDEN,

a witness called by and on behalf of the Pinkerton's National Detective Agency, Inc., Respondent, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: Will you give the Reporter your name?

The Witness: J. O. Camden. [335]

* * * * *

(Thereupon, the document above referred to was marked Pinkerton's Exhibit No. 1 for identification, and was received in evidence.)

PINKERTON'S EXHIBIT No. 1

International Longshoremen's & Warehousemen's Union [Letterhead]

Mr. Camden **March 31, 1948**

Pinkerton National Detective Agency
Monadnock Building
San Francisco, California

Dear Mr. Camden:

This is to notify you that in accordance with the agreement we are demanding that Thomas Stenhouse be immediately removed from work with your company.

Mr. Stenhouse is delinquent in his dues.

Very truly yours.

/s/ Michael Johnson
Contract Guards & Patrolmen

MJ:rg
uopwa-cio-34

* * * * * [336]

(Thereupon, the document above referred to was marked Pinkerton's Exhibit No. 2 for identification.)

PINKERTON'S EXHIBIT No. 2

COPY

Suite 357 Monadnock Building,
San Francisco 5, California.

March 31st, 1948

Mr. Michael Johnson,
International Representative,
International Longshoremen's & Warehousemen's Union
604 Montgomery Street,
San Francisco 11, California.

Dear Mr. Johnson:

Your letter March 31st.

This will advise you that instructions have been given today that Guard Thomas Stenhouse be separated from the pay rolls of our Agency. This action is being taken in accordance with the provisions of our Agreement with the C.I.O. and upon your advice that Mr. Stenhouse is delinquent in his dues.

It will be understood that the International Warehousemen's Union will be responsible for the defense of any action which this man may take for re-instatement of employment; also should it later be found that he is entitled to wages as a result of this action, such costs will be borne by the Union.

Very truly yours,

Pinkerton's National Detective Agency, Inc.
Assistant General Manager.

* * * * *

[337]

(Testimony of J. O. Camden)

Q. Now then, Mr. Camden, I direct your attention to the occasion of the strike that took place among the Pinkerton guards, as has been testified to previously. Will you state what date that occurred on?

A. On August 5.

Q. At that time, I believe you testified that you were in [345] New York? A. Yes, sir.

Q. When did you return to this area?

A. On August 7.

Q. At that time did you execute this document that has been offered in evidence here as the return to work agreement? A. Yes, sir.

Q. Who prepared that document?

A. Well, it was actually written by the U. S. Conciliator of Labor, Mr. Hillenbrand.

Q. At that time, on August 7, you and Mr. Johnson signed it; is that correct? A. Yes, sir.

Q. On or about August 7, did you order that Mr. Conners, Mr. Slater, and Mr. Holmes be removed from employment on Marine Lynx? Did you ask that they be taken off the job? Did you give instructions that they be taken off the job?

A. I don't think that I specifically instructed that they be taken off, but it was definitely understood and I knew that they were to be taken off through our Patrol Superintendent at that time.

Trial Examiner Myers: It was understood between whom?

Mr. Magor: Between whom?

(Testimony of J. O. Camden)

The Witness: Between myself and the Patrol Superintendent.

Trial Examiner Myers: What do you mean "understood"? [346]

The Witness: Well, he was present at the time this return to work agreement was signed, and it was understood there and agreed that these men would be taken off the registered list.

Trial Examiner Myers: Understood and agreed between whom?

The Witness: Our Patrol Superintendent and myself, and Mr. Johnson was also present.

Trial Examiner Myers: Was it an agreement between you and Mr. Johnson?

Mr. Leonard: That is objected to.

Trial Examiner Myers: And with your superintendent?

Mr. Leonard: I object to——

Trial Examiner Myers: Overruled.

Mr. Leonard: May I state the grounds for it?

Trial Examiner Myers: Certainly.

Mr. Leonard: The Agreement of August 7th was reduced to writing, and I submit that it reflects what the parties agreed to. This is an attempt to vary the terms of the agreement by parole evidence.

Trial Examiner Myers: Will you read the question to the witness?

(The last question was read by the Reporter.)

Trial Examiner Myers: And the superintendent of patrol?

(Testimony of J. O. Camden)

The Witness: Yes. [347]

Trial Examiner Myers: When was that agreement made?

The Witness: Well, that is a part of this return to work agreement. The provision of it is that we agreed there that the registered list was to be revised.

Mr. Leonard: In view of the witness' answer, may I renew my objection that the agreement was the document itself. There was no other document.

I move to strike anything with respect to an oral agreement, or an agreement outside the written paper.

Trial Examiner Myers: The motion is denied.

Q. Now, Mr. Camden, following August 7, did you have a conversation with me concerning this return to work agreement? A. Yes sir, I did.

Q. Following that conversation with me, did you communicate with Mr. Johnson? A. I did.

Q. What did you say to him?

A. I told him that our counsel had advised that we were wrong in signing the agreement that had been signed. It was a violation of the provisions of the Taft-Hartley Act.

Q. Did you talk to Mr. Johnson with respect to dispatching Mr. Conners, Mr. Slater, and Mr. Holmes? A. I did.

Q. What was the conversation?

A. I told him that, in accordance with our Council's advice, [348] both ourselves and the union

(Testimony of J. O. Camden)

would be in trouble and charged with unfair labor practices if we continued to carry out the provisions of the agreement.

Trial Examiner Myers: When was this conversation?

The Witness: This was on either the 9th or the 10th of August.

Trial Examiner Myers: What did Mr. Johnson say?

The Witness: He said, "Send him back to work."

Q. (By Mr. Bahrs): Did Mr. Johnson ask that they be required to clear with him before they were sent back to work?

A. He did not. [349]

* * * * *

Q. Did Mr. Conners tell you that he had been dispatched to work at Pier 41 by Mr. Bishop?

A. Yes.

Q. Did Mr. Conners ask you at that time if he could carry a gun? A. He did.

Q. What did you say?

A. That he could not.

Q. Do you permit any of your guards to carry guns on the waterfront? A. No.

Q. Did Mr. Conners say at that time that he was not going to go down and jeopardize his life?

A. I don't recall whether he did or not.

Q. Did you hear him testify here, Mr. Camden?

A. I did.

Q. Did you hear him say that? A. Yes.

(Testimony of J. O. Camden)

Q. You don't recall?

A. I don't recall whether he did or not. Perhaps he did.

Q. In any event, after you told him that you would not permit him to carry a gun on the waterfront, do you know whether or not Mr. Conners accepted that assignment of waterfront work?

A. He did not [351]

Q. He did not. At that time did you offer him any other work? A. I did.

Q. Would you please state what the work was?

A. I told him that if he objected to working on the waterfront we would give him non-waterfront work.

Q. Mr. Camden, do you know whether or not a strike occurred on the waterfront, commencing on or about September 2nd? A. Yes, I do.

Q. Involving a number of unions, such as the Longshoremen's Union and the Marine Cooks and Stewards? A. Yes, sir.

Q. And other sea-going crafts. Do you know whether or not the Longshoremen's Union, the Firemen's Union, and the Marine Cooks and Stewards and so forth had a strike committee?

A. I understand they did, yes, sir.

Q. They had a strike committee. Do you know whether or not they would permit Pinkerton guards to go through their picket lines with or without a permit?

Mr. Magor: I object to that as calling for an opinion and conclusion of the witness.

(Testimony of J. O. Camden)

Trial Examiner Myers: Do you know of your own knowledge?

The Witness: From my own personal knowledge, I don't.

Trial Examiner Myers: All right. I will sustain the objection. [352]

Q. Did you send anybody to work as a guard on the waterfront without securing a permit from the Joint Strike Committee? A. No.

Q. Were all Pinkerton guards performing work on the waterfront during the time that the Longshoremen's strike was in progress required to secure permits in order to go to work in the waterfront?

Mr. Magor: I object to that as calling for an opinion and conclusion of the witness.

Trial Examiner Myers: Do you know that of your own knowledge, Mr. Camden?

The Witness: I know of my own knowledge to the extent——

Trial Examiner Myers: Do you know of your own knowledge? Do you?

The Witness: Yes, I do.

Trial Examiner Myers: All right. Then answer the question. The objection is overruled.

The Witness: They were required to. [353]

* * * * *

GERMAIN BULCKE

a witness called by and on behalf of the International Longshoremen's and Warehousemen's Union and the Contract Guards' and Patrolmen's Organiz-

(Testimony of Germain Bulcke)

ing Committee, being first duly sworn, was examined, and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name, sir?

The Witness: Germain Bulcke.

Trial Examiner Myers: Where do you live, sir?

The Witness: I live at 50 Church Street, San Francisco.

Trial Examiner Myers: You may be seated.

Mr. Leonard, you may proceed with the examination of this witness.

Q. (By Mr. Leonard): Mr. Bulcke, what is your business or occupation?

A. I am Vice President of the International Longshoremen's and Warehousemen's Union. [358]

* * * * *

Q. Mr. Bulcke, beginning on September 2, 1948, there was a strike of maritime workers and longshoremen on the Pacific Coast; is that correct?

A. That is correct.

Q. Do you know of your own knowledge whether or not the striking unions set up some kind of a joint committee to handle the strike for them? [365]

A. They did.

Q. Do you know whether or not for maintenance workers, guards, and other people who had to go behind the picket lines on the docks, there was some procedure for obtaining clearances?

A. Yes, definitely.

Q. Persons who had such business on the docks,

(Testimony of Germain Bulcke)

as I have indicated specifically, from whom would they obtain clearance?

A. From the Joint Action Committee.

Q. This was the Joint Committee of the striking Unions?

A. It was a committee composed of representatives of all the unions on strike at that time.

Q. The guards and watchmen's union was not on strike at that time?

A. That is correct. [366]

* * * * *

Recross Examination

Q. (By Mr. Magor): Who was the Contract Guards Organizing Committee formed by?

A. The Contract Guards Committee was formed by the group themselves.

Q. Who directed the formation of them?

A. The group originally was part of Local 34. By action of that local and the men themselves, they requested to be set up in a separate organization. That request was made to the International and was granted. They were then set up as a Contract Guards Organizing Committee.

Trial Examiner Myers: When was this set up?

The Witness: I believe, to the best of my recollection, some time in December, 1947. The exact date escapes me.

Q. Do they have a charter?

A. They have since been chartered as a local.

Q. When were they chartered?

(Testimony of Germain Bulcke)

A. They were chartered in January of 1949.

* * * * * [372]

After Recess

(Whereupon, the hearing was resumed, pursuant to the recess, at 2:00 o'clock, p.m.)

Trial Examiner Myers: Gentlemen, are you ready to proceed?

Mr. Magor: The General Counsel is ready to proceed.

Mr. Bahrs: I am ready to proceed.

Trial Examiner Myers: Has the General Counsel any witnesses he wishes to call in rebuttal?

Mr. Magor: At this time I would like to ask Mr. Leonard if we might reach a stipulation that after June 15, 1948, there had been no UA election held between the company and the union, pursuant to Provision 9(e) of the Act.

Mr. Leonard: As far as I know, that is right. Do you know of any, Mr. Bahrs.

Mr. Bahrs: I will stipulate that we never heard of one.

Trial Examiner Myers: Was one conducted by the National Labor Relations Board?

Mr. Bahrs: Not to my knowledge.

Mr. Leonard: Not to my knowledge. I have no objection to the Trial Examiner taking administrative notice if you will want to examine the Board's files in the record. As far as I know, there was not any such election.

Trial Examiner Myers: Is that your understanding, Mr. Bahrs? [375]

Mr. Bahrs: My understanding is that there was not any.

Trial Examiner Myers: Is that your understanding?

Mr. Magor: That is my understanding. [376]

* * * * *

Trial Examiner Myers: Mr. Bahrs, have you any comments that you wish to make? [385]

* * * * *

Mr. Bahrs: Now, with reference to the other three charging parties, we make no question of the fact that on or about August 7, they were taken off the Marine Lynx. We make no question of [388] the reasons for their being taken off the Marine Lynx. It is uncontroverted that a strike occurred at the operations of the Pinkerton's Detective Agency, and the strike was settled by the execution of this return to work agreement, which is in evidence. It is also a fact, and I say it advisedly, that within two or three days after that deal took place, and I may say, after Mr. Johnson had cooled off, Mr. Camden testified that he called up Mr. Johnson and told him that to persist in this course of conduct was going to get the union in trouble, and the Pinkerton's Detective Agency into trouble. [389]

* * * * *

In the United States Court of Appeals
for the Ninth Circuit

No. 12,861

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

PINKERTON'S NATIONAL DETECTIVE AGENCY, INC., and CONTRACT GUARDS AND PATROLMEN'S ORGANIZING COMMITTEE, I.L.W.U.,
Respondents.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 203.87, Rules and Regulations of the National Labor Relations Board—Series 5, as amended (redesignated Section 102.87, 14 F. R. 78), hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a consolidated proceeding had before said Board, entitled, "In the Matter of Pinkerton's National Detective Agency, Inc., and Thomas W. Stenhouse, John T. Conners, Walter J. Slater, and Charles O. Holmes, individuals; In the Matter of Contract Guard's and Patrolmen's Organizing Committee, I.L.W.U. and International Longshoremen's and Warehousemen's Union, C.I.O., and John T. Conners, Charles O. Holmes, and Walter J. Slater, in-

dividuals," the same being known as Cases Nos. 20-CA-120 and 20-CB-33, respectively, before said Board, such transcript including the pleadings, and testimony and evidence upon which the order of the Board in said consolidated proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Order designating Howard Myers, Trial Examiner, for the National Labor Relations Board, dated March 29, 1949.

2. Stenographic transcript of testimony taken before Trial Examiner Myers on March 29, 30, and 31, 1949, together with all exhibits introduced in evidence.

3. Letter from respondent Contract Guards' and Patrolmen's Organizing Committee, I.L.W.U., hereinafter called respondent Committee, dated April 6, 1949, requesting extension of time for filing brief before Trial Examiner.

4. Copy of Chief Trial Examiner's telegram, dated April 11, 1949, granting all parties extension of time for filing briefs.

5. Respondent Committee's letter, dated April 27, 1949, requesting further extension of time for filing brief before Trial Examiner.

6. Copy of Chief Trial Examiner's telegram, dated April 29, 1949, granting all parties further extension of time for filing briefs.

7. Copy of Trial Examiner Myers' Intermediate Report, dated May 18, 1949 (annexed to item 14 hereof); order transferring cases to the Board, dated May 18, 1949, together with affidavit of service and United States Post Office return receipts thereof.

8. Respondent Committee's request for permission to argue orally before the Board, dated May 24, 1949. (Denied, See Board's Decision and Order, dated June 9, 1950, Item 14 hereof.)

9. Respondent Committee's letter, dated May 28, 1949, requesting extension of time for filing exceptions and brief.

10. Request of respondent Pinkerton's National Detective Agency, Inc., hereinafter called respondent Pinkerton, for permission to argue orally before the Board, received May 31, 1949. (Denied, see Board's Decision and Order, dated June 9, 1950, Item 14 hereof.)

11. Copy of Board's telegram, dated June 1, 1949, granting all parties extension of time for filing exceptions and briefs, together with copy of Board's telegram, dated June 2, 1949, directing regional director to notify charging party W. J. Slater of extension.

12. Respondent Pinkerton's exceptions to the Intermediate Report, received June 21, 1949.

13. Respondent Committee's exceptions to the Intermediate Report, received June 27, 1949.

14. Copy of Decision and Order issued by the National Labor Relations Board on June 9, 1950, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 14th day of February, 1951.

/s/ FRANK M. KLEILER,
Executive Secretary

[Seal] National Labor Relations Board

[Endorsed]: No. 12,861. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Pinkerton's National Detective Agency, Inc., and Contract Guards and Patrolmen's Organizing Committee, I.L.W.U., Respondents. Transcript of Record. Petition for Enforcement of an Order of The National Labor Relations Board.

Filed: February 19, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12,861

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

PINKERTON'S NATIONAL DETECTIVE AGENCY, INC., and CONTRACT GUARDS AND PATROLMEN'S ORGANIZING COMMITTEE, I.L.W.U.,
Respondents.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judge of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. III, Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondents, Pinkerton's National Detective Agency, Inc., San Francisco, California, hereinafter called Pinkerton, its officers, agents, successors, and assigns and Contract Guards and Patrolmen's Organizing Committee, I.L.W.U., hereinafter called Committee, its officers, representatives, and agents, or the officers, representatives, and agents of its successors. The consolidated proceed-

ing resulting in said order is known upon the records of the Board as "In the Matter of Pinkerton's National Detective Agency, Inc., and Thomas W. Stenhouse, John T. Conners, Walter J. Slater, and Charles O. Holmes, individuals; In the Matter of Contract Guard's and Patrolmen's Organizing Committee, I.L.W.U., and International Longshoremen's and Warehousemen's Union, C.I.O., and John T. Conners, Charles O. Holmes, and Walter J. Slater, individuals," the same being known as Cases Nos. 20-CA-120 and 20-CB-33, respectively.

In support of this petition the Board respectfully shows:

1. Respondent Pinkerton is a Delaware corporation engaged in business in the State of California, within this judicial circuit where the unfair labor practices occurred and respondent Committee is a labor organization admitting to membership employees of Pinkerton in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

2. Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on June 9, 1950, duly stated its findings of fact and conclusions of law, and issued an order directed to Respondent Pinkerton, its officers, agents, successors, and assigns and to Respondent Committee, its officers, representatives, and agents,

or the officers, representatives, and agents of its successors. The aforesaid order provides as follows:

* * * * *

[Printer's Note: Order is duplicate of Order set out in full at page 93 of this printed record.]

3. On June 9, 1950, the Board's Decision and Order was served upon Respondent's by sending copies thereof postpaid, bearing Government frank, by registered mail, to Respondents' counsel.

4. Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the consolidated proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph 2 hereof, a decree enforcing in whole said order of the Board, and requiring Respondent Pinkerton, its officers, agents, successors, and assigns and Respondent Committee, its officers, rep-

resentatives, and agents, or the officers, representatives, and agents of its successors, to comply therewith.

NATIONAL LABOR RELATIONS BOARD

By /s/ A. NORMAN SOMERS,
Assistant General Counsel.

Dated at Washington, D. C., this 14th day of February, 1951.

* * * * *

[Printer's Note: Appendix A and B are set out in full at pages 68-70 of this printed record.]

[Endorsed]: Filed Feb. 19, 1951. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY

In this proceeding, petitioner, National Labor Relations Board, will urge and rely upon the following points:

1. The Board properly found that the Company violated Section 8(a) (3) of the Act, as amended, by discriminating against four of its waterfront guards, and that the Union violated Section 8 (b) (2) by causing the Company to do so with respect to three of the guards.

2. The Board properly found that the Union

violated Section 8 (b) (1) (A) of the Act, as amended.

3. The Board acted reasonably in imposing joint and several liability for back pay upon the Company and the Union.

/s/ A. NORMAN SOMERS,
Assistant General Counsel
National Labor Relations Board

Dated February 14, 1951. Washington, D. C.

[Endorsed]: Filed Feb. 19, 1951. Paul P. O'Brien, Clerk.

[Title of Cause.]

ORDER TO SHOW CAUSE

The President of the United States of America:

To: Pinkerton's Nat'l Detective Agency, Inc., 681 Market St., Room 372, San Francisco, Calif.; Contract Guard's & Patrolmen's Organizing Committee, ILWU, and Int. Longshoremen's & Warehousemen's Union, CIO, 90 Market St., San Francisco, Calif., and Contract Guard's & Patrolmen's Organizing Com., ILWU, & Int. Longshoremen's & Warehousemen's Union, CIO, Pier 16, Bulkhead Bldg., San Francisco, Calif.,

Greeting:

Pursuant to the provisions of Subdivision (e) of

Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each of you are hereby notified that on the 19th day of February, 1951, a petition of the National Labor Relations Board for enforcement of its order entered on June 9, 1950, in a proceeding known upon the records of the said Board as "In the Matter of Pinkerton's National Detective Agency, Inc., and Thomas W. Stenhouse, John T. Conners, Walter J. Slater and Charles O. Holmes, individuals, Case No. 20-CA-120; and in the Matter of Contract Guard's & Patrolmen's Organizing Committee, ILWU, and International Longshoremen's & Warehousemen's Union, CIO, and John T. Conners, Charles O. Holmes, and Walter J. Slater, individuals, Case No. 20-CB-33," and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 20th day of Feb-

ruary in the year of our Lord one thousand, nine hundred and fifty-one.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Return on Service of Writ attached.

[Stamped]: Received Feb. 21, 1951, U. S. Marshal's office.

[Endorsed]: Filed Feb. 27, 1951. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

ANSWER OF PINKERTON'S NATIONAL DETECTIVE AGENCY, INC.

Pinkerton's National Detective Agency, Inc., answers the petition on file herein as follows:

I.

That Pinkerton's National Detective Agency, Inc., has complied with all of the provisions and requirements of the order of the National Labor Relations Board directed to Pinkerton's National Detective Agency, Inc., in the above matter, save and except payment of back pay to the employees specified in such order and the posting of the notice set forth as Appendix "A" to said order, which declares in part that Pinkerton's National Detective Agency, Inc., will make such employees whole for any loss of pay suffered as a result of the discrimination against them.

II.

That defendant, Pinkerton's National Detective Agency, Inc., is not liable for back pay to any of the employees specified in such order, to wit, employees Stenhouse, Connors, Slater and Holmes, and that the order of the National Labor Relations Board is contrary to the Labor Management Relations Act 1947 for the following reasons:

Section 10 of the Labor Management Relations Act 1947 specifically provides and declares that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him.

Defendants, International Longshoremen's & Warehousemen's Union, and Contract Guards & Patrolmen's Organizing Committee, are responsible for such discrimination as may have been suffered by the above named employees here involved.

The finding by the Trial Examiner and the National Labor Relations Board that International Longshoremen's and Warehousemen's Union had not committed the unfair labor practices here involved is not supported by substantial evidence on the record considered as a whole.

Defendant, Pinkerton's National Detective Agency, Inc., is not responsible for such discrimination as may have been suffered by the above named employees here involved.

The finding by the National Labor Relations Board that Pinkerton's National Detective Agency, Inc., is responsible for the discrimination suffered

by the above named employees is not supported by substantial evidence on the record as a whole.

The National Labor Relations Board, in attempting to impose several liability on Pinkerton's in the Stenhouse case, and joint and several liability on Pinkerton's and the Contract Guards & Patrolmen's Organizing Committee in the cases of Connors, Slater and Holmes, acted contrary to the provisions of the Labor Management Relations Act, 1947, and without any authority in law.

Wherefore, Pinkerton's National Detective Agency, Inc., prays that the order of the National Labor Relations Board be modified to conform to the Labor Management Relations Act, 1947, by eliminating therefrom the requirement of any payment of back pay by Pinkerton's National Detective Agency, Inc., and that the petition therein be dismissed as to Pinkerton's National Detective Agency, Inc.

PINKERTON'S NATIONAL DETECTIVE AGENCY, INC.,
By WILLIAM B. BOYD,
Assistant General Manager in charge of Western Region.

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Mar. 9, 1951. Paul P. O'Brien, Clerk.

[Title of Cause.]

ORDER TO SHOW CAUSE

The President of the United States of America:

To: Contract Guard's & Patrolmen's Organizing Committee, ILWU, and International Longshoremen's & Warehousemen's Union, CIO, c/o Mr. Mike Johnson, 2615 Bartlett St., Fruitvale, California,

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each of you are hereby notified that on the 19th day of February, 1951, a petition of the National Labor Relations Board for enforcement of its order entered on June 9, 1950, in a proceeding known upon the records of the said Board as "In the Matter of Pinkerton's National Detective Agency, Inc., and Thomas W. Stenhouse, John T. Conners, Walter J. Slater and Charles O. Holmes, individuals, Case No. 20-CA-120; and in the Matter of Contract Guard's & Patrolmen's Organizing Committee, ILWU, et al., Case No. 20-CB-33," and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of

such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 10th day of August in the year of our Lord one thousand, nine hundred and fifty-one.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Return on Service of Writ attached.

[Stamped]: Received Aug. 13, 1951, U. S. Marshal's office.

[Endorsed]: Filed Aug. 28, 1951. Paul P. O'Brien, Clerk.

No. 12861

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PINKERTON'S NATIONAL DETECTIVE AGENCY, INC., AND CONTRACT GUARD'S AND PATROLMEN'S ORGANIZING COMMITTEE, I. L. W. U., RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the United States Court of Appeals for the Ninth Circuit

No. 12861

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PINKERTON'S NATIONAL DETECTIVE AGENCY, INC., AND CONTRACT GUARD'S AND PATROLMEN'S ORGANIZING COMMITTEE, I. L. W. U., RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, Secs. 151 *et seq.*),[1] for enforcement of its order issued on June 9, 1950, against Pinkerton's National Detective Agency, Inc., hereafter called the Company, and against Contract Guard's and Patrolmen's Organizing Committee, I. L. W. U., hereafter called the Union, following the usual proceedings under Section 10 of

[1] Relevant portions of the Act appear in the Appendix, *infra*, pp. 30–33.

the Act. The Board's decision and order (R. 77)[2] are reported in 90 NLRB 205. This Court has jurisdiction of this proceeding under Section 10 (e) of the Act, the unfair labor practices having occured in San Francisco, California, within this judicial circuit.[3]

STATEMENT OF THE CASE

I. The Board's findings of fact and conclusions of law

Briefly, the Board found that the Company discriminated against several employees in violation of Section 8 (a) (3) of the Act by refusing employment to them because of their failure to maintain good standing in the Union, notwithstanding the absence of a

[2] References to the printed record are designated "R." Those references preceding a semicolon are to the Board's findings and those following a semicolon are to the supporting evidence.

[3] Both the Company and the Union stipulated, and the record shows, that the Company, a Delaware corporation with regional offices in San Francisco, California, is engaged in the business of furnishing protection service to individuals and business establishments, including operators of ships engaged in the transportation of passengers and cargo between ports on the Pacific Coast and other ports located in various States of the United States, its territories and possessions, and in foreign countries; and that during the year ending December 31, 1947, the Company received over $600,000 for services supplied in the West Coast region, 85 percent of which was received for its services to operators of passenger and cargo ships (R. 29; 4–6, 12, 101). Although the Company has not questioned the Board's jurisdiction, the Union has contended that there is no evidence in the record to show that the Company's and its own activities affected commerce.

In view of the admitted facts, however, the Board's finding (R. 29) that the unfair labor practices affected commerce is clearly correct. *Butler Bros.* v. *N. L. R. B.*, 134 F. 2d 981, 983 (C. A. 7), certiorari denied, 320 U. S. 789. Cf. *N. L. R. B.* v. *E. C. Atkins & Co.*, 331 U. S. 398; *Slover* v. *Wathen*, 140 F. 2d 258 (C. A. 4); *Walling* v. *Sondock*, 132 F. 2d 77, 78 (C. A. 5), certiorari denied 318 U. S. 772.

valid union-security agreement between the Company and the Union. The Board also found that the Union caused the Company to refuse employment to all but one of these employees for the stated reason and thereby violated Section 8 (b) (2) of the Act. In addition, the Board found that the Union further violated Section 8 (b) (1) (A) by engaging in various acts of restraint and coercion against the Company's employees in the exercise of their rights under Section 7 of the Act. We set forth below in detail the Board's subsidiary findings and conclusions.

A. The illegal union shop contract

On August 1, 1946, the International Longshoremen's and Warehousemen's Union, hereinafter called the International, acting on behalf of Local 34 and certain other of its locals, entered into a collective bargaining agreement with the Company (R. 30; 111). The agreement contained the following union-shop provisions (R. 112):

> Section I. Recognition:
>
> The Employer recognizes the Union as the sole collective bargaining agent * * * for all persons employed as guards and patrolmen * * *.
>
> Section II. Union Shop:
>
> It is understood in hiring to fill all vacancies of new positions, the Employer will, under this Agreement, choose his own source of new employees. The Employer agrees to notify the Union of such employment. New employees so hired under and subject to this Contract shall join the Union within fifteen (15) days of the date of their employment.

> The Employer agrees to terminate within forty-eight (48) hours the employment of any employee who becomes delinquent and in bad standing with the Union.

By its terms the contract was to "remain in full force and effect until June 15, 1947, and shall be renewed from year to year thereafter" unless either party gave timely notice prior to that date to terminate it. The contract was renewed for one year on June 15, 1947 pursuant to the automatic renewal clause contained therein (R. 31–32; 106, 112).

In December 1947, Local 34 sequestered its maritime guards and patrolmen members and placed them into an organization known as the Contract Guard's and Patrolmen's Organizing Committee, respondent Union herein (R. 32; 217).[4] Thereafter, the Union operated under the renewed agreement with the tacit approval of the Company (R. 32; 106). On June 15, 1948, after the effective date of the amended Act, the agreement, including the union-shop provisions, was again automatically renewed (R. 32; 107). The Union had not been authorized by the employees, as required by Sections 8 (a) (3) and 9 (e) of the amended Act to make a union-shop agreement (R. 48; 218–219).

The Board found that the union-shop provisions of the agreement as renewed on June 15, 1948, were repugnant to Section 8 (a) (3) of the Act because a majority of the Company's employees had not authorized the Union to execute a union-security agreement as provided in Section 9 (e) of the Act, and, further,

[4] The Union was chartered by the International in January 1949 (R. 32; 217–218).

because that provision required new employees to join the Union within fifteen days of the date of their employment instead of thirty days, as required by Section 8 (a) (3) of the Act (R. 48–49, 91).

B. The Union's coercive letter of July 7, 1948 and subsequent unlawful strike

Shortly after the second renewal of the contract, the Company was advised by its attorneys that the union-shop provisions thereof were not binding (R. 107–108). Accordingly, representatives of the Union and of the Company met to discuss the question of enforcement of these provisions. The Company took the position that the union-shop provisions were illegal. The Union, however, insisted that they were valid and therefore binding upon the Company (R. 32; 115–117, 134). Thereafter, on July 7, 1948, Michael Johnson, the Union's organizer and business agent (R. 33; 108), sent to all of the Company's guards a letter threatening reprisals against those who failed to remain in good standing with the Union. The letter stated, in part, that (R. 87–88; 172–173):

> 1. The coastwide agreement between the ILWU-CIO and the Pinkerton agency has been extended until June 15, 1949 by mutual agreement between the Company and the Union, and all of its terms and conditions are in effect and full force until that date. Anyone who tells you any different is just a plain liar and is only doing so to break down your union—the union that raised your wages *$4.00* a *day* in two years.

* * * * *

3. The membership voted unanimously that the fines for being delinquent in dues be enforced. Starting July 9 these fines will be in effect and delinquents will be dealt with according to the agreement.

* * * * *

Following its meeting with the Company, the Union gave the Company a list containing the names of a number of employees who were delinquent in their dues. Among those listed were Conners, Slater, and Holmes, and possibly Stenhouse, all of whom were employed by the Company as waterfront guards (R. 39; 206, 207). Apparently, the Company continued to give assignments to these employees and in the first week of August 1948, the Union called a brief strike to force the Company, as the Board found, to discharge those employees who were not members in good standing in the Union (R. 37–35, 88–89; 110, 139–140, 144).

On the basis of the foregoing facts the Board found (R. 88–89) that the Union in violation of Section 8 (b) (1) (A) of the Act restrained and coerced the Company's employees in the exercise of their right to refrain from becoming or remaining members in a labor organization, absent a valid union-security agreement, by (a) threatening employees with loss of employment for failure to pay union dues and maintain membership in the Union and (b) striking to compel the Company to discharge Conners, Slater, and Holmes because of their failure to pay union dues.

C. The discriminatory layoffs

On August 7, 1948, Business Agent Johnson and J. O. Camden, the Company's assistant general manager (R. 102), executed an agreement settling the strike (R. 37; 115). The agreement (R. 128) provided, among other things, that "Preference of employment shall be given to members of the Union who are available, willing, and able to work." At the hearing before the trial examiner, Camden testified (R. 50–51; 210–212) that at this meeting it was also "understood" and "agreed" between the Company's and the Union's representatives that the employment of Conners, Slater, and Holmes, who had discontinued paying union dues, be terminated. On the same day, the Company removed them from employment as waterfront guards (*ibid.*).

Two or three days later, Camden advised Johnson that the strike settlement agreement with its preferential hiring clause violated the Act, and that both the Company and the Union "would be in trouble and charged with unfair labor practices" if, pursuant to their understanding, they continued to refuse employment to Conners, Slater, and Holmes (R. 51–52; 212–213). Johnson had by this time apparently "cooled off" (R. 219) and directed Camden to send the three employees back to work (R. 52; 213). As will appear below (pp. 8–14), however, although assignments were offered to Conners, Slater, and Holmes shortly thereafter, the Union subsequently again caused the Company to refuse waterfront assignments to the three employees because they were delinquent in their dues. The Company also, al-

though not at the instigation of the Union, refused employment to Stenhouse for the same reason. The facts relating to the layoffs of these employees are as follows:

1. The layoff of Slater

a. On August 7, 1948

Walter J. Slater, who was employed by the Company as a waterfront guard (R. 44; 174), had stopped paying dues to the Union sometime after May 1948 (R. 44; 175). Between July 20 and 25, the Union's business agent, Johnson, telephoned Slater and told him, "Unless you get over here and pay some dues, you are not going to work" (*ibid.*).

On August 6, 1948, upon completion of his work for that day Slater telephoned O'Neal, a regular dispatcher for the Company (R. 39; 176), regarding his next assignment. Instead of giving him an assignment, O'Neal said, "Don't you know that we have got a strike on here on account of you fellows?" O'Neal then stated that he would communicate with Slater later (R. 44–45; 176–177). This promise was not fulfilled and on the following day, Slater telephoned O'Neal, who advised him, "Until this strike is settled, we cannot give you any information" (R. 45; 178). As already pointed out (*supra,* p. 7), pursuant to the agreement made when the strike was settled on August 7, the Company terminated the employment of Slater and other employees who were delinquent in their dues.[5]

[5] In the middle of August, the Company offered a waterfront assignment to Slater who thereupon asked Assistant Manager Camden whether it would be advisable to accept the assignment in

b. On September 16, 1948

On September 2, 1948, a number of unions on the west coast, including several affiliates of the International, began a general waterfront strike and established picket lines at the waterfront (R. 41, 81–82; 214–215). No employees were permitted to pass through the picket lines without clearance from the striking unions (R. 41, 81–82; 216–217). Although respondent Union did not participate in the strike (R. 217), the Company was notified that it would be necessary for all its employees to obtain permits to pass through the picket lines (R. 82; 205).

On September 16, 1948, the Company gave Slater a waterfront assignment conditioned, however, on his obtaining a clearance permit from Business Agent Johnson (R. 45; 180–181, 183–5). That afternoon Slater, accompanied by John T. Conners, another complainant herein (*infra,* p. 10), visited Johnson's office to obtain clearances. Johnson stated that he had not decided whether to clear them and left to make a phone call. When he did not return after

view of the then "existing conditions." Despite Business Agent Johnson's direction to put the delinquent members back to work (*supra*, p. 7). Camden seized this opportunity to advise Slater against accepting the assignment, saying, "No, Slater, I don't think it would be advisable. I thank you for calling me, and I will have you released from this assignment, and I will call you back later and talk to you." Camden, however, did not call Slater as he had promised (R. 45; 178–179). The Board found that Slater was not justified in refusing the assignment and, therefore, that he was not discriminated against between August 11 and September 16 when, as appears above, the Company and the Union again acted to deny him employment (R. 80–81).

thirty or forty minutes had elapsed, Slater and Conners left (R. 41–42; 45–46, 181–183).

The following day, when Slater telephoned the Company for an assignment, he described his experience at Johnson's office and received no assignment (R. 186). Thereafter, he received no further waterfront assignments from the Company (R. 46; 188).[6]

2. The layoff of Conners

a. On August 7, 1948

The layoff of John T. Conners, another of the Company's waterfront guards, followed substantially the same pattern as Slater's. Conners had stopped paying dues to the Union in May or June 1948 (R. 40 n. 8; 147). About 9:00 p. m. on August 7, the day on which the strike settlement agreement was entered into between the Company and the Union, Baxter, a substitute dispatcher for the Company, phoned Conners and instructed him not to report to his regular 11:00 p. m. assignment on the S. S. *Marine Lynx* (R. 39; 149). The following morning, August 8, Conners phoned Dispatcher O'Neal to ascertain the reason for Baxter's instructions. O'Neal stated (R. 39; 150):

> We got a list of names here that Mike Johnson brought up to us, and your name is on the

[6] On October 4, 1948, the Company offered Slater a job at a construction project at a higher hourly rate of pay than he had been receiving as a waterfront guard. Slater refused the assignment because he was working elsewhere (R. 83; 205–206). The Board accordingly found that by turning down the job, Slater indicated his intention to sever all remaining connections with the Company and refused to order his reinstatement or to award him any back pay after October 4 (R. 83).

list of nonpayment of dues. So, we can't do anything about it.

On August 9, Conners advised Assistant Manager Camden of the situation and was told to see Gerard, the Captain of the Guards. Gerard told Conners that he had not been dispatched because his name was on the delinquency list which Johnson had presented to the Company (R. 39–40; 150–153). Conners was never again assigned to the S. S. *Marine Lynx* (R. 154).[7]

b. On September 16, 1948

On September 16, 1948, during the general waterfront strike, Conners, like Slater, received an assignment conditioned on his obtaining clearance to pass through the picket lines (R. 40; 157). As already stated (*supra,* pp. 9–10), Conners and Slater requested clearances from Business Agent Johnson, who did not comply with their request. The following day, Conners spoke to Captain Gerard, Dispatcher O'Neal and substitute Dispatcher Baxter regarding a work assignment. During their discussion, a telephone call was received from Johnson. O'Neal asked Johnson whether it was necessary for Conners and Slater to pay their back dues in order to obtain clearances and was told that it was. O'Neal so informed Con-

[7] On August 10, 1948, Conners was offered a waterfront assignment for the following day. Like Slater, he asked Assistant Manager Camden whether to accept the assignment, was advised in the negative, and turned it down (R. 40, 80–81; 154–156). As in the case of Slater, the Board found that in view of Conners' refusal of the assignment, the Company did not discriminate against Conners between August 11 and September 16, 1948 (R. 80–81).

ners and Gerard stated that he would communicate with Conners later (R. 42–43; 160–161). Conners did not, however, receive any further waterfront assignments from the Company (R. 42–43; 164).[8]

3. The layoff of Holmes

For about six months prior to August 7, 1948, Walter L. Holmes had worked steadily for the Company as a guard on the S. S. *Marine Lynx* (R. 46; 190). Sometime after June 1, Holmes stopped paying dues to the Union (*ibid.*). On August 7, 1948, at about 5:00 p. m., he received his assignment for the succeeding three or four days to guard the S. S. *Marine Lynx*.[9] At seven o'clock that evening, however, his dispatcher telephoned Holmes and stated, "I am sorry, Holmes, but you can't go to work tomorrow, * * * Michael Johnson just handed us a list of men that can't go to work, and your name is on the list" (R. 46; 191).

On August 9, 1948, Holmes sent a letter to Johnson enclosing his dues book and a money order for $5.00 in payment of his July and August 1948 dues (R. 46–47; 191–193). On the same day, Holmes informed

[8] On October 7, the Company offered Conners a two-day assignment guarding an industrial building. Conners refused the assigment because it would have jeopardized a steady job which he had secured and to which he was to report on the second day of the two-day assignment, and because the rate of pay for the industrial assignment was 90 cents per hour as compared with $1.20 per hour for waterfront work (R. 43–44; 166–167, 170–171).

[9] Under the Pacific Coast Working and Dispatching Rules, which were incorporated in the Company's collective bargaining agreement with the Union (R. 84; 113–114), a guard dispatched to a ship when it first came into port was entitled to continue working on that ship until it was moved (R. 84; 105–106).

his dispatcher that he had paid the dues and asked for an assignment. The reply was, "No, we can't do that, not until we get an O. K. or something similar to that from Michael Johnson." A few days later the letter and money order were returned to Holmes (*ibid.*).

Thereafter, Holmes received a few waterfront assignments from the Company, but he was not fully restored to his prior status. Thus, during the week ending August 14, 1948, he obtained only sixteen hours of waterfront work as compared with the forty hours which he had worked the preceding week (R. 47; 193–194). On August 15, Holmes began a two-week vacation. During the second week the Company was shorthanded and requested Holmes to cut his vacation short. Accordingly, he worked eight hours on August 27 and seven hours on August 28 on waterfront assignments (R. 84; 194–195).[10] Thereafter, Holmes telephoned the Company on seven consecutive days, but received no further waterfront assignments from the Company although such assignments were available (R. 47; 196–197).[11]

[10] Although Holmes was entitled to continue working on the S. S. *Marine Lynx* (*supra*, p. 12, n. 9), he was assigned to the *President Polk* on August 11, to the *President Taft* on August 14, to the *Marine Lynx* on August 27, and to pier 40 on August 28 (R. 193–194).

[11] That waterfront assignments were available is, as the Board found (R. 84–86), indicated by several circumstances. Thus, as noted above, the Company called Holmes back to work twice during his vacation. During the general waterfront strike which began on September 2 and lasted until December 1948 the Company's detail of waterfront guards averaged 55½ daily in September, October, and November and 94 in December (Tr. 344–345).

About the middle of September, having concluded that the Company would not give him waterfront work, Holmes requested industrial assignments. Holmes, however, disliked such assignments, because of their uncertainty, their low wages, and the consequent need for working longer hours. Accordingly, on November 13, he advised the Company, "I'm afraid we'll have to call the whole thing off, if that's the best you can do." On November 15, Holmes turned in his equipment to the Company (R. 47; 197–198).

On December 17 or 18, 1948, Holmes received a telephone call from Dispatcher Jamison, who informed him that he could have his waterfront job with the Company if he could "square" himself with the Union. Holmes declined this conditional offer, stating that he had been "flimflammed too much to consider coming back" (R. 85; 200).

4. The layoff of Stenhouse

Thomas W. Stenhouse was also employed by the Company as a waterfront guard (R. 33; 135). Some time prior to February 1948, Stenhouse stopped paying dues to the Union (R. 33; Tr. 102, 105). On March 29, 1948, he was informed by Dispatcher Jamison that Business Agent Johnson had stated that Stenhouse could no longer work for the Company as a waterfront guard (R. 33; 135–136). On March 31,

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It is thus apparent that Holmes, who was No. 56 on the seniority register then being used by the Company in dispatching guards (R. 86; 117–126), was reached for assignment but not called. Moreover, during the strike the Company hired 12 new guards (R. 86; 118, 129, 132; Tr. 69).

1948, Johnson wrote to the Company demanding the immediate discharge of Stenhouse because he was delinquent in his dues to the Union (R. 33; 208). The union-shop agreement between the Company and the International then in effect was valid at that time by virtue of Section 102 of the Act and Stenhouse was discharged pursuant to Johnson's request (R. 33; 209).

On July 19, 1948, when the union-shop provision was no longer valid, the contract having been renewed on June 14, 1948, and being therefore no longer covered by Section 102, *infra,* p. 20, Stenhouse reapplied to the Company for a job as a waterfront guard. Although Assistant Manager Camden promised him a job, Stenhouse received no assignment (R. 34; 136–137). On July 21, he telephoned Camden, who apologized and promised him that he would nevertheless receive four days' pay for that week and five days' pay for the following week. Stenhouse received the promised four days' pay on July 23 but was not paid for the following week (R. 34–35; 138–139). On July 26, 1948, Stenhouse again asked Camden for an assignment. Camden, referring to the Union, stated to Stenhouse, "I just wanted to explain to you, Stenhouse, what the situation is. They are going to walk off the job if you walk on" (R. 35; 139–140, 144). Stenhouse received no further assignments and the four days' pay was the last pay received by him from the Company (R. 35–36; 141). There is no evidence in the record that the Union ever knew of Camden's offer to reemploy

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Stenhouse in July or that it induced Camden specifically to refuse Stenhouse any work assignments (R. 79).

5. The Board's conclusions with respect to the layoffs

On the basis of the foregoing facts, the Board and the trial examiner found (R. 56, 80–83) that the Company discriminated against the the four guards discussed above in violation of Section 8 (a) (3) of the Act by (a) refusing waterfront assignments to Conners and Slater from August 7 to 10, 1948, inclusive, because they were delinquent in their dues to the Union; (b) conditioning Slater's employment from September 16 to October 4, 1948 inclusive and Conners' employment on and after September 16, 1948 on their obtaining clearances from the Union to pass through the picket lines;[12] and (c) denying waterfront employment to Stenhouse on and after July 23, 1948 and Holmes on and after August 7, 1948, because they were delinquent in their dues to the Union.

The Board also found that the Union had caused the Company discriminatorily to deny employment to Conners, Slater, and Holmes for the periods set forth above because of their failure to maintain membership in good standing in the Union and that the Union thereby violated Section 8 (b) (2) of the Act.[13]

[12] The Board, disagreeing with the trial examiner, found that Conners and Slater were not discriminated against from August 11 to September 16, 1948 (R. 80–81).

[13] The Board, disagreeing with the trial examiner, concluded (R. 79–80) that the record did not warrant a finding that the Union had specifically caused the Company to deny Stenhouse employment and accordingly found no violation on the part of the Union

The Board further found that the Union violated Section 8 (b) (1) (A) by the threat of its business agent, Johnson, to Slater that the latter would receive no more waterfront assignments if he failed to pay his dues.

II. The Board's order

The Board's order (R. 93–98) requires the Company and the Union to cease and desist from the unfair labor practices found. The order also requires the Company to offer Stenhouse, Conners, and Holmes reinstatement to their former or substantially equivalent positions, and to make Stenhouse whole for any loss of pay suffered by him by reason of its discrimination against him.[14] The order further requires the Company and the Union, both of whom were responsible for the discrimination against Conners, Slater, and Holmes, jointly and severally to make these employees whole for any loss of pay they may have suffered by reason of the discrimination against them during the periods specified in the order.[15]

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with respect to Stenhouse. The Board did find, however (R. 80), that the Company refused employment to Stenhouse after July 23, 1948, because of his failure to maintain good standing in the Union and, as noted above, found that the Company's action in this respect constituted unlawful discrimination.

[14] Since Slater indicated in October 1948 that he did not desire further employment with the Company, the order does not require his reinstatement.

[15] The Board adopted (R. 79) the examiner's recommendation that the complaint insofar as it named the International as a respondent be dismissed because the evidence failed to show that it had participated in the unfair labor practices committed by the Union. Since, however, no exceptions were taken by the Company

SUMMARY OF ARGUMENT

The record adequately supports the Board's findings that the Company denied waterfront employment to the four guards because of their failure to maintain good standing in the Union and that the Union caused the Company to deny such employment to three of the guards for that reason. Since the union-security agreement between the Company and the Union was invalid, and therefore affords no defense to such denial of employment, the Company and the Union by their action engaged in unfair labor practices prohibited by, respectively, Sections 8 (a) (3) and 8 (b) (2) of the Act.

The Union also violated Section 8 (b) (1) (A) of the Act by threatening economic reprisals against employees who failed to maintain good standing in the Union and by striking to force the dismissal of employees who failed to maintain such standing. In the absence of a valid union-security agreement, as here, a union may not exert economic pressure upon employees to forego their statutory right to refrain from becoming or remaining members of a union and

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or other party to the proceedings to the examiner's recommendation in this respect (R. 71–76), the Board did not pass on its correctness. The Company in its answer (R. 231) seeks review of the Board's dismissal of the complaint against the International. Under well established principles, the Company, having failed to take exception to the examiner's recommendation and to raise this objection before the Board, is precluded from urging it now. Section 10 (e) of the Act. *N. L. R. B.* v. *Cheney California Lumber Co.*, 327 U. S. 385, 387–389, *N. L. R. B.* v. *Noroian* (C. A. 9, Nov. 28, 1951). This Court on November 14, 1951, denied the Company's motion to remand the case to the Board to take additional evidence allegedly establishing that it was the International, acting through the Union, that committed the unfair labor practices found.

such pressure constitutes restraint and coercion prohibited by Section 8 (b) (1) (A).

The Board properly ordered the Company, severally and jointly with the Union, to make three of the guards whole for any loss of pay caused by the discrimination against them and severally to make whole the fourth guard for such loss. The Company cannot disclaim responsibility for the discrimination against any of the guards because the Union caused it to engage in such discrimination. The Company's ultimate control over the employment of the guards and its failure to resist the Union's invasion of that control suffice to charge the Company, severally and jointly with the Union, with responsibility for the discriminatory denial of employment and for any loss of pay to the guards resulting from the discrimination against them.

ARGUMENT

I

The Board properly found that the Company violated Section 8 (a) (3) of the Act by refusing employment to the four waterfront guards because of their failure to maintain membership in good standing in the Union and that the Union violated Section 8 (b) (2) by causing the Company so to discriminate against three of the guards.

Section 8 (a) (3) of the Act makes it an unfair labor practice for an employer to refuse work to an employee because of nonmembership, or failure to maintain membership in good standing, in a labor organization, except pursuant to a union-shop agreement executed in conformity with the requirements of Section 8 (a) (3). Similarly, Section 8 (b) (2)

of the Act makes it an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against employees in violation of Section 8 (a) (3), except as permitted by a valid union-security agreement between the union and the employer. Two of the statutory requirements for a valid union-security agreement, in effect when the unfair labor practices found here occurred, were (a) that any such agreement must afford to new employees at least thirty days from the commencement of their employment to join the union and (b) that a majority of the employees in the bargaining unit covered by the agreement have in a Board-conducted election, as provided in Section 9 (e) of the Act, authorized the union to enter into such an agreement.

The union-shop agreement on the basis of which employment was denied to the complainants in the instant case failed to meet either of these statutory requirements and therefore was invalid.[16] The agreement required new employees to join the Union within fifteen days following their employment and the

[16] It is not disputed that the agreement does not fall within the savings provisions of Section 102 of the Act. Unlike the agreement in *N. L. R. B.* v. *Clara-Val Packing Co.*, 191 F. 2d 556, which this Court held to be within the savings provisions of Section 102 because it was executed prior to the amended Act and was to continue without expiration date until terminated, the agreement here, although originally executed prior to the amended Act, was for one year and thereafter automatically renewable from year to year in the absence of notice to the contrary. The agreement was automatically renewed for a one year period on June 14, 1948, after the effective date of the amended Act. Since, therefore, it was thereby "renewed or extended" after that date, it does not come within the exemption of Section 102, as this Court pointed out in *Clara-Val.*

Union had never been authorized by the employees to enter into such an agreement.[17] *United Mine Workers* v. *N. L. R. B.,* 184 F. 2d 392 (C. A. D. C.), certiorari denied, 340 U. S. 934; *N. L. R. B.* v. *Peerless Quarries, Inc.,* 296 L. R. R. M. 2262 (C. A. 10, Dec. 31, 1951); *N. L. R. B.* v. *National Maritime Union,* 175 F. 2d 686, 690–691, n. 8 (C. A. 2), certiorari denied, 338 U. S. 954; *N. L. R. B.* v. *Acme Mattress Co.,* 192 F. 2d 524 (C. A. 7), enforcing 91 NLRB 1010. Hence, the agreement, failing as it did to meet the statutory prerequisites, affords no defense to an otherwise discriminatory denial of employment. Accordingly, if, as the Board found, the Company denied employment to the four guards herein because of their failure to maintain good standing in the Union and the Union caused the Company so to discriminate against three of them, the Company and the Union have engaged in unfair labor practices proscribed by, respectively, Section 8 (a) (3) and 8 (b) (2) of the Act. *G. W. Hume Co.* v. *N. L. R. B.,* 180 F. 2d 445, 447 (C. A. 9); *N. L. R. B.* v. *Peerless Quarries, Inc., supra; N. L. R. B.* v. *Newman,* 187 F. 2d 488 (C. A. 2), enforcing *per curiam* 85 NLRB 725; *N. L. R. B.* v. *Don Juan, Inc.,* 178 F. 2d 625, 627 (C. A. 2); *N. L. R. B.* v. *Newspaper and Mail Deliverers' Union*

[17] In 1951 Congress amended the Act and omitted the requirement that a union be authorized by the employees in a Board conducted referendum to enter into a union-security agreement. Act of October 22, 1951, Pub. L. 189, 82d Cong., 1st Sess. This amendment, without regard to any question of retroactive application (cf. *Eastern Coal Co.* v. *N. L. R. B.,* 176 F. 2d 131, 136–137 (C. A. 4)), does not affect the conclusion that the agreement here in question was defective. The Act continues to require that such agreements afford new employees thirty days following their employment within which to join the union.

192 F. 2d 654 (C. A. 2); see *N. L. R. B.* v. *Clara-Val Packing Co.*, 191 F. 2d 556 (C. A. 9).

The record in the instant case, summarized above, clearly establishes that Stenhouse, Holmes, Slater, and Conners were refused waterfront assignments by the Company during the stated periods solely because they had failed to pay dues and were not therefore in good standing with the Union. In the absence of a valid union-security agreement the Company's denial of employment to the four complainants for that reason was discriminatory within the proscription of Section 8 (a) (3) of the Act. See cases *supra*, p. 21. The Company does not now challenge this conclusion. In its answer to the Board's petition for enforcement of its order, the Company challenges only the propriety of the Board's order requiring it either severally or jointly with the Union to make any of the complainants whole for loss of pay caused by the discrimination against them (R. 230). We discuss this point *infra*, pp. 26–29.

The Union has filed no response to the Board's petition for enforcement of its order. Before the Board it urged principally that the record did not support any finding that the Union in violation of Section 8 (b) (2) had caused the Company to discriminate against three of the complainants (Holmes, Conners and Slater),[18] particularly after August 9 or

[18] As already noted, *supra*, p. 16, the Board found that the Union did not cause the Company to deny employment specifically to Stenhouse because of his failure to maintain good standing in the Union. The Board found that the Company, however, denied employment to Stenhouse for that reason. Accordingly, the Board concluded that only the Company was liable for back pay to Stenhouse.

10, 1948 when the Union's business agent, Johnson, told the Company that the three employees could be given waterfront assignments again and they were in fact given occasional assignments thereafter. The Board properly rejected this contention and found that beginning on August 7, 1948 and at various times thereafter the Union caused the Company to deny waterfront employment to the three guards because of their failure to maintain good standing in the Union.

As already stated (*supra*, pp. 6–8) the Union insisted that the Company discontinue giving waterfront assignments to guards, including the three guards here under discussion, who were delinquent in their union dues and during the first week of August 1948 called a strike to enforce that demand. On August 7, the Company and the Union executed a strike settlement agreement giving preference for employment to union members and pursuant to an understanding between it and the Union, the Company removed Conners, Slater, and Holmes from their employment as waterfront guards because of their failure to maintain good standing in the Union.

Although the Company, at the Union's direction, offered a few waterfront assignments to the three guards after August 9 or 10, 1948, the discrimination against them continued. Thus, on September 16, 1948, the Union refused to give clearance to Conners and Slater to cross the picket lines established during the general west coast strike because of their arrears in dues and the Company thereafter declined to dispatch them to waterfront assignments because of the

Union's failure to clear them, although such work was available (*supra,* pp. 9–12).

Holmes, after the Company terminated his employment on August 7, offered to pay his dues but the Union refused to accept them. Thereafter the Company removed Holmes from his regular assignment on the S. S. *Marine Lynx* to which he was entitled as a matter of right under the Pacific Coast Working and Dispatching Rules that had been incorporated in the Company's collective bargaining agreement. Holmes received no further waterfront assignments after August 28 and was told by the Company in December 1948 that he could have his waterfront job back only if he would "square" himself with the Union—a step which the Union had previously precluded him from taking (*supra,* pp. 12–14).

Significantly, neither the Union nor the Company ever advised these three guards that the August 7 layoffs would not be repeated and that no further discrimination would be practiced against them. Nor did the Company and the Union abrogate the illegal union security provision in their collective bargaining agreement or the clause in the strike settlement agreement giving preference to Union members for employment. And finally, none of the three guards was listed on the seniority register of November 30, 1948, on the basis of which the Company dispatched guards.[19]

[19] While it might be expected that Slater and Holmes would not be listed since the former had refused an assignment as late as October 4, 1948, and the latter had turned in his equipment on November 15, no reason has been suggested for the omission of Conners' name from the register.

In this state of the record the Board reasonably concluded that the Union had, in violation of Section 8 (b) (2) of the Act, caused the Company to discriminate against the three guards; that the Union's direction that they be put back to work was only a temporary relaxation of its pressure against the Company to force it to refuse employment to them and that the Union continued after August 9 or 10 to cause the Company to discriminate against them.

II

The Board properly found that the Union in violation of Section 8 (b) (1) (A) of the Act restrained and coerced the Company's employees in the exercise of rights guaranteed by the Act

The record discloses, without contradiction (*supra,* pp. 5–6), that on July 7, 1948, the Union's business agent, Johnson, sent to the Company's employees a letter informing them in substance that failure to pay dues and maintain good standing in the Union, as required by the agreement between the Union and the Company, would jeopardize their continued employment.[20] Later that month, Johnson warned Employee Slater that he would not be permitted to work unless he paid his dues (*supra,* p. 8). In August 1948 the Union called a strike to force the Company to discontinue the employment of guards not in good standing with the Union (*supra,* p. 6). The Board correctly found that by engaging in the foregoing

[20] The agreement (*supra*, pp. 3–4) required the Company to discharge within 48 hours any employee who failed to pay his dues.

activities the Union violated Section 8 (b) (1) (A) of the Act.

That section provides, in relevant part, that it shall be an unfair labor practice for a labor organization or its agents "to restrain or coerce (A) employees in the exercise of the rights guaranteed under Section 7 * * *." Among the rights guaranteed to employees by Section 7 is the right to refrain from becoming or remaining a member of a union, except to the extent that such right may be affected by a valid union security agreement. Since, as we have shown, the union security agreement requiring membership in the Union as a condition of employment was invalid, the Union's threats of loss of employment against employees who refused, as was their right, to maintain their membership in good standing, and the use of its economic power to effectuate these threats plainly constitute restraint and coercion within the prohibition of Section 8 (b) (1) (A). *Mavis* v. *N. L. R. B.* 186 F. 2d 671 (C. A. 10), certiorari denied, 342 U. S. 813; *N. L. R. B.* v. *United Mine Workers,* 190 F. 2d 251 (C. A. 4), enforcing 92 NLRB 953; *Union Starch and Refining Co.* v. *N. L. R. B.,* 186 F. 2d 1008 (C. A. 7), certiorari denied, 342 U. S. 815.

III

The Board properly ordered the Company and the Union, jointly and severally, to make whole three of the guards for any loss of pay they may have suffered as a result of the discrimination against them

The Company challenges as invalid the Board's order insofar as it imposes liability upon it severally

or jointly with the Union for any loss of pay suffered by the guards as a result of the discrimination against them. The Company asserts that it was not "responsible" for the discrimination against the guards, that the real offender was the Union and that under Section 10 (c) of the Act [21] the Union alone is answerable for any loss of pay suffered by the guards.

The Company's disclaimer of responsibility is, as this and other courts have repeatedly held in similar situations, untenable. Although the discrimination against the guards might not have been effected but for the Union's demands, the fact remains that, in the ultimate analysis, it was the Company which controlled the employment of the guards. Because control over the hiring and discharge of employees rests with the employer, it is the duty of an employer to resist the usurpation of his control over employment by any group that seeks to utilize such control for or against any labor organization, and the Act affords no immunity because the employer believes the exigencies of the moment require that he capitulate to the pressures and violate the statute. *N. L. R. B.* v. *Fry Roofing Co.*, 29 LRRM 2221 (C. A. 9, November 30, 1951); *N. L. R. B.* v. *Star Publishing*

[21] Section 10 (c), in relevant part, empowers the Board to issue orders requiring persons who have engaged in unfair labor practices "to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him; * * *."

Co., 97 F. 2d 465, 470 (C. A. 9); *N. L. R. B.* v. *G. W. Hume Co.,* 180 F. 2d 445, 447 (C. A. 9).[22]

Since the Company cannot, therefore, disclaim responsibility for the discrimination, Section 10 (c) does not relieve it of liability, severally or jointly with the Union, for loss of pay suffered by the guards as a result of the discrimination against them. As the Court of Appeals for the Seventh Circuit, holding that the Board could impose joint and several liability upon an employer for loss of pay suffered by employees discharged at the insistence of a union, has stated (*Union Starch and Refining Co.* v. *N. L. R. B.,* 186 F. 2d 1008, at p. 1014, (certiorari denied, 342 U. S. 815)):

> Congress manifested no intent to restrict [in Section 10 (c)] the remedial powers of the Board to a compulsory choice between the parties responsible for the discrimination suffered by the discharged employees. On the contrary, we think the amended section correlates the remedial parts of the Act with those substantive provisions of the amendments, and must be construed to permit the Board to hold an employer and a union liable for back pay where it finds them both responsible for the loss suffered by the discharged employees.

Accord: *N. L. R. B.* v. *Newspaper and Mail Deliverers Union,* 192 F. 2d 654 (C. A. 2); *N. L. R. B.* v. *Fry*

[22] Accord: *N. L. R. B.* v. *Fred P. Weissman Co.,* 170 F. 2d 952, 954–955 (C. A. 6), certiorari denied 336 U. S. 972; *N. L. R. B.* v. *American Car & Foundry Co.,* 161 F. 2d 501, 502–503 (C. A. 7); *Wilson & Co., Inc.* v. *N. L. R. B.,* 123 F. 2d 411, 417 (C. A. 8); *N. L. R. B.* v. *National Broadcasting Co.,* 150 F. 2d 895, 900 (C. A. 2).

Roofing Co., supra, enforcing 89 NLRB 854; *N. L. R. B.* v. *Acme Mattress Co., Inc.,* 192 F. 2d 524 (C. A. 7) enforcing 91 NLRB 1010; *N. L. R. B.* v. *Peerless Quarries, Inc.,* 29 LRRM 2262 (C. A. 10, Dec. 31, 1951).[23]

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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FEBRUARY 1952.

[23] Cf. the rule commonly applied in the field of torts that when the acts of two or more persons result in a legal wrong all of the joint tortfeasors are jointly and severally responsible for the entire damages, without regard to which of them initiated the wrong, and even though one of them may have acted under duress. *Restatement of the Law—Torts*, Vol. IV, Sec. 879.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Sec. 151, *et seq.*), are as follows:

Rights of Employees

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

SEC. 8 (a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in sec-

tion 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

Representatives and Elections

SEC. 9. * * *

(e) (1) Upon the filing with the Board by a labor organization, which is the representative

of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

* * * * *

Prevention of Unfair Labor Practices

SEC. 10. * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *.

U. S. GOVERNMENT PRINTING OFFICE: 1952

No. 12,861

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

PINKERTON'S NATIONAL DETECTIVE AGENCY, INC., and CONTRACT GUARDS & PATROLMEN'S ORGANIZING COMMITTEE, I.L.W.U.,
Respondents.

BRIEF OF PINKERTON'S NATIONAL DETECTIVE AGENCY, INC.

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JURISDICTION.

This matter is before this Court upon petition by the National Labor Relations Board for enforcement of its order herein, which petition is filed herein pursuant to Section 10(e) of the Labor Management Relations Act, 1947.

STATEMENT OF THE CASE.

The sole issue before this Court is the interpretation and application of that portion of the Labor Management Relations Act, 1947, appearing in Section 10(c) thereof and reading as follows:

"Provided that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. * * *."

FACTS.

The facts in this case are simple and are relatively free from conflict as the brief for the Board will show.

Under date of August 1, 1946, the International Longshoremen's & Warehousemen's Union, acting in behalf of certain of its locals, entered into a collective bargaining contract with Pinkerton's National Detective Agency, Inc., which by its terms was to remain in full force and effect until June 15, 1947, and was to be renewed from year to year thereafter unless either party gave notice to the other in writing of its desire to modify or terminate it not less than sixty (60) days prior to its anniversary dates. (R. p. 3.)

This contract contained a form of union security known as the "union shop" under which all employees are required to join the union within fifteen days of the date of their employment. (R. p. 31.)

Some time between June 15 and August 7, 1948, representatives of Pinkerton's and representatives of the Union met for the purpose of discussing the union shop provision of the contract. Pinkerton's representatives and its attorneys took the position that the union shop provision of the contract was repugnant

to the Act (because no election authorizing the union shop had been held and because the union had not qualified as required by Section 9 (f) (g) and (h) of the Taft-Hartley Act) while, on the other hand, the representative of the organizing committee and its attorney contended that, since the contract had automatically renewed itself, all provisions thereof were still in full force and effect. (R. pp. 32 and 33.)

With matters in this state of deadlock the union applied increasing pressure on the employer to prevent the employment of anyone not in good standing with the union. This is evident from the fact that, although on July 19 Camden, who was Pinkerton's manager, promised Stenhouse a job, on July 26 Camden told Stenhouse, "I just wanted to explain to you, Stenhouse, what the situation is. They are going to walk off the job if you walk on." (R. p. 35.)

Shortly thereafter the union demanded that Pinkerton's discharge the three other complainants, Conners, Slater and Holmes, for non-payment of dues in the union. When the employer refused to do so the union struck on August 7th. This strike was directed not solely against the three named complainants but was also intended to demonstrate to Pinkerton's that the union meant by every means at its command to prevent the reemployment of Stenhouse and the employment of anyone else who was not in good standing with the union. This is the construction placed upon the facts by the Trial Examiner.

With respect to Stenhouse, the Trial Examiner found that the organizing committee induced Pinker-

ton's discriminatorily to refuse employment to Thomas W. Stenhouse on and after July 23, 1948, because he failed and refused to maintain membership in good standing in the organizing committee. (R. pp. 54 and 79.)

The Trial Examiner further declared that the union had caused the employer to discriminate against all four complainants (including Stenhouse). The Trial Examiner said:

> "The Organizing Committee has caused Pinkerton's, an employer, to discriminate against the four-named complainants herein in violation of Section 8(a)(3) of the Act thereby restraining and coercing the employees of Pinkerton's in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(b)(2) and 8(b)(1) thereof." (R. p. 56.)

The Board, however, limited the union's responsibility to three of the four named complainants, saying:

> "We have found that both Pinkerton's and the Organizing Committee are responsible for the discrimination suffered by Conners, Slater and Holmes." (R. p. 92.)
>
> "The complaint does not allege that the Organizing Committee was responsible for Stenhouse's discharge. * * *." (R. p. 79.)
>
> "* * * We are not warranted in going beyond the complaint to find on the record as it exists that the Organizing Committee violated Section 8(b)(2) by inducing Pinkerton's to discharge Stenhouse." (R. p. 80.)

> "It is uncontroverted, however, that Conners, Slater and Holmes were relieved of their respective assignments on August 7, 1948, upon demand of the Organizing Committee. The strike in 1948 was called by Johnson and it was not called off until Pinkerton's agreed to do the bidding of the Organizing Committee and lay off the three named persons." (R. pp. 53 and 54.)

Laying to one side for the time being the correctness of the Board's action in reversing the Trial Examiner's findings, we have here a situation where the employer has in good faith attempted to comply with the requirements of the statute and has stoutly resisted all threats of the union and all attempts by the union to force it to violate or to disregard the law up to and including taking a strike. After the strike had been called by the union and had been in effect for a period of two or three days and it was obvious that the employer had no chance of winning the strike but was confronted with the alternative of either going out of business or acceding to the union demands, the employer capitulated.

Both parties thereby violated the statute. With respect to back pay, however, the statute explicitly declares that the party *responsible* for the discrimination shall be liable for the back pay in such case. The question presented in this case therefore is whether the National Labor Relations Board can hold both the employer and the union jointly and severally liable for back pay merely by making a finding that they are both responsible for the discrimination. It is re-

spectfully submitted that such a finding is not supported by substantial evidence on the record considered as a whole.

ARGUMENT.

We are, of course, aware of the fact that there is a line of Court decisions upholding findings of the Board that, under the particular facts of these cases, both the employer and the union were responsible for the discrimination suffered by the employees in question. None of those Court decisions, however, purported to pass upon the question presented in this case as will be seen from the review of those decisions.

Perhaps the leading case on the point above discussed is the decision of the United States Court of Appeals for the Seventh Circuit in *Union Starch & Refining Co. v. N.L.R.B.*, 186 Fed. (2d) 1008. The precise point decided by the Court in that case appears from the following language which is quoted from the opinion of the Court:

> "Nevertheless, the company makes the point that *although* the company and the union may *both be responsible* for the unlawful discharge, the amended section 10(c) contemplates that 'either one or the other would be responsible for the back pay, but not both.' " (Italics ours.)
>
> * * * * * * *
>
> "Congress manifested no intent to restrict the remedial powers of the Board for a compulsory choice between the parties responsible for the discrimination suffered by the discharged employees. * * *"

It will be noted that the argument of the company *assumed* that *both* the union and the company were *responsible* for the discrimination and did not challenge the finding of the Board.

In that case, moreover, there was ample evidence from which the Board could find that both the employer and the union were responsible for the discrimination suffered by the employees. It appeared without contradiction in the evidence that the union wrote to the company demanding the discharge of the employees under the union-shop clause of the collective bargaining contract; whereupon the company made its own *independent* investigation to determine whether or not union membership was available to the employees on the same terms and conditions generally applicable to other members. The personnel director of the company met with the employees in question and interviewed them.

After the company's independent investigation the employees were discharged, not on the ground that they had not tendered dues and initiation fees, but because they had failed to file an application card to attend a meeting of, and take an oath of loyalty to, the union.

It thus appears that the union requested the employer to discharge the employees in question and that the employer *upon its own independent investigation* did so. As it turned out, both the union and the employer were incorrect in their interpretation of the law and it follows, naturally, that the Board was

justified in holding them jointly and severally liable for the back pay to the employees.

The same Court in a later decision followed and upheld the rule of the *Union Starch* case. This was in the matter of *National Labor Relations Board v. Acme Mattress Co.,* 192 Fed. (2d) 524. In this case the United States Court of Appeals for the Seventh Circuit declared as follows:

> "This court held in *Union Starch & Refining Co. v. National Labor Relations Board,* 186 Fed. (2d) 1008, that where the Board found that *both the employer and the union were responsible* for loss suffered by a discharged employee the Board properly held the employer and the union jointly and severally liable for back pay under the Act. * * *" (Italics ours.)

In the *Acme Mattress* case the company made *no objection* to the inclusion of a union-shop clause in the projected contract despite the fact that neither of the unions involved had ever been certified by the Board as a result of a Board conducted election to determine whether the majority of employees in the union desired to authorize the labor organization to make such an agreement with the employer. In this case a strike took place over a wage issue. One of the union employees expressed dissatisfaction with the conduct of a representative of the International Union. Subsequently the international representative told the employer that he would have to discharge the employee in question before a contract was signed.

Although the employer protested, he, nevertheless, went into a conference with the union at which time the contract was signed and the employee was discharged one hour after the strike was ended.

There was no showing whatever of any resistance to the illegal union security clause by the employer and only a perfunctory objection to discharging the employee in question. There was evidence from which the Board could have found both the employer and the union responsible for the unfair labor practice. Indeed, and very significantly, the employer did not attack the finding of the Board that both the employer and the union were responsible, but confined its objection to the fact that the order should not be directed against it because, subsequent to the episode in question, the company had been judicially declared insolvent and was not then actively engaged in business. The Court however held that this was not an adequate defense.

The next case in point of time is *National Labor Relations Board v. Newspaper Deliverers Union,* 192 Fed. (2d) 654, decided by the United States Court of Appeals for the Second Circuit. This also involved a petition of the National Labor Relations Board for enforcement of an order holding both the employer and the union jointly and severally liable for back pay. In that case the Court said:

> "It is also argued that the Board *cannot* order both the union and Hearst to compensate these individuals jointly and severally. We are in ac-

> cord with the holding in Union Starch & Refining Co., 186 F. (2d) 1008, that the Board may impose such joint and several liability when both the union and the employer have engaged in discriminatory practices. It is also argued that Hearst cannot be found guilty of violating the Act or be ordered to compensate injured employees because it engaged in such practices only under union coercion. Threats of strike and actual strikes, economic coercion is no excuse for violating the Act we have already decided in similar situations." (Citation.) (Italics ours.)

It will thus be seen that the arguments addressed to the United States Court of Appeals for the Second Circuit were, first, that the Board *could not hold* both the employer and the union liable for the back pay. This is in effect a reiteration of the argument advanced by the employer in the *Union Starch* case to the effect that the Board was compelled to make an election of one or the other but could not hold both liable jointly and severally. We have no quarrel with the rule laid down by the Court in the *Union Starch* case that on a proper set of facts the Board may on the evidence presented find that both the union and the employer were responsible for the discrimination. An example of this is the *Union Starch* case itself where the employer discharged the employees at the demand of the union but after the employer's own independent investigation.

The second point argued in *National Labor Relations Board v. Newspaper Deliverers Union* is that

the employer could not be found guilty of violating the Act because it engaged in such practices only under coercion or strikes or threatened strikes. The rule is well established that an employer may be *guilty of a violation of the statute* even though it acts under union coercion, including strikes. This is not the narrow issue which we desire to present to the Court.

Even though the employer has acted under union coercion, the Board may find that the employer *has discriminated* against the employee and may order the employer to *reinstate* such employee in order to effectuate the purposes of the Act. However, on the single, narrow issue of *liability for back pay,* the statute specifically provides that back pay be ordered against the employer or the labor organization, as the case may be, *responsible* for the discrimination. There was no argument on this point either in the *Acme Mattress Co.* case or in *National Labor Relations Board v. Newspaper Deliverers Union* and these cases cannot be considered as authorities in support of the position of the Board.

A later decision by this Court in the case of *National Labor Relations Board v. Fry Roofing Co.,* 29 L.R.R.M. 2221 (C.A. 9 Nov. 30, 1951) also announces the rule that the fact that the employer's acts were done under coercion of the union or under economic duress does not constitute a defense to a charge that the employers violated the statute.

This, however, is not a ruling on the explicit language of the statute above referred to.

PRIOR BOARD RULINGS ON UNION LIABILITY FOR BACK PAY.

The two types of violation of the statute resulting from union activities directed against individual employees because of their non-membership in a labor organization are those set forth in Sections 8(b)(1) and (2) of the statute. Section 8(b)(1) makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Subdivision 2 makes it an unfair labor practice for a union to cause an employer to discriminate against an employee in violation of subsection 8(a)(3).

The National Labor Relations Board itself has declared that union violations of Section 8(b)(1) (restraint or coercion of employees) *do not result in a liability of the union for back pay.* According to the Board the *only* section of the statute in which a union liability for back pay is contemplated is a violation of Section 8(b)(2), or, more narrowly, only where the union has in fact *caused* the employer to discriminate against an employee.

This is illustrated by the recent decision of the Board in the matter of *Electrical Workers Union,* 95 N.L.R.B. 47, 28 L.R.R.M. 1323. In this case the Board said as follows:

> "The trial examiner recommended that the union be required to make whole the three employees who were kept from working during the strike called by the union when the employer refused the union's request for a discriminatory reduction of these employees' seniority.

> "This recommendation is rejected for the reasons stated in the Colonial Hardwood case."

We return now to the *Colonial Hardwood* case. In this case (*Colonial Hardwood Flooring* case, 85 N.L.R.B. 563, 24 L.R.R.M. 1302), the strikers physically impeded the non-strikers and prevented their entering the plant. There were additional threats and acts of physical violence. The Board found that the international and the local were liable for all these acts of restraint and coercion which the Trial Examiner found to be unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

Back pay was refused, however, in this case, the Board saying:

> "Like the Trial Examiner, we deny the request made by the Company for an order indemnifying employees for any loss of earnings they may have suffered because of the Respondents' unfair labor practices.[5] We believe that we are *without power* to take such a step in the absence of an express mandate from Congress. The amended Act provides that back pay may be required of a labor organization *only* where it is responsible for unlawful discrimination against an employee.[6] An award of back pay here would be in the nature of damages to the employee for an interference with his right of ingress to the plant, as contrasted with compensation to him for losses in pay suffered by him because of severance of or interference with the tenure or terms of the employment relationship between him and his employer in the ordinary case in which back pay is awarded *and*

to which Section 10(c) of the Act has been held for many years to refer. The Act contains *no* provision authorizing the Board to require damages or back pay of a labor organization under such circumstances.[7] Nor is there any legislative history that could impel a conclusion that such awards are authorized. We therefore find that the Board lacks power to grant the remedy requested by the Company in this case." (Italics ours.)

"5. The General Counsel excepted to the Trial Examiner's refusal to recommend such a remedy, but has since withdrawn his exception. However, the Company, which also excepted in this respect, pressed its exception when it argued orally before the Board.

"6. The relevant portion of Section 10(c) of the Act, where the power of the Board to issue orders to prevent and remedy unfair labor practices is granted, is as follows:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any * * * unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him.

"7. See *Matter of National Maritime Union of America*, 78 NLRB 971, where the Board similarly held that it had no power to require damages of a labor organization responsible for unfair labor practices resulting in injury to certain employers."

As it now appears from the rulings of the Board that the *only* case in which a union may be held liable for back pay is the case where the union has in fact caused the employer to discriminate against an

employee, it must follow that this is the only situation to which the provisions of Section 10(c) of the statute are applicable.

The decision of the Board in the *Electrical Workers Union* case and the *Colonial Hardwood Flooring* case are two specific rulings of the Board to the effect that the union is not liable for back pay in cases of violations of Section 8(b)(1), namely, where the union has restrained or coerced the employees in the exercise of the rights guaranteed in Section 7. We think it is possible to state further that the decision by the Board in the *Electrical Workers Union* case is a ruling to the effect that the union is not liable for back pay in a case where it struck an employer and shut down his operations in an effort to cause the employer to discriminate against certain employees. Under the ruling of the Board there was no liability of the union so long as its efforts to cause the employer to discriminate were unsuccessful even though they closed down the employer's operations and thereby threw the employees in question out of work. It follows logically, therefore, as we have said under these decisions, that the *only* case in which a union is liable for back pay is a case where the union has in fact *caused* the employer to discriminate against an employee—*in other words, a case where both the union and the employer have violated the statute.* Therefore, this is the *only* situation to which Section 10(c) applies.

It then becomes appropriate to inquire into the proper meaning and interpretation of the word "re-

sponsible" as used in the relevant portions of Section 10(c) so frequently cited herein. It is respectfully submitted that, as used in such section, the words "responsible for the discrimination" *cannot* be interpreted as being synonymous with "having violated the statute" or "having committed an unfair labor practice".

There would be no sense to this provision of Section 10(c) nor any purpose in its inclusion in the statute if both the employer and the union were automatically responsible for the discrimination by reason of the fact that the employer had discriminated against an employee and the union had caused it to do so. In *every* such case the liability would be joint and several and the directions of Section 10(c) would be meaningless.

But the legislative history clearly demonstrates that the legislature had no intention of making the employer and the union jointly and severally liable for back pay in such case but intended that the entire liability for back pay should be assessed against whichever of these two parties was responsible for the discrimination.

This is shown by Senate Report No. 105 on S-1126 (Legislative History LRMA 1947) at page 432, which reads in part as follows:

> "Section 10(c). This subsection is amended by the proviso in two respects: (1) Back pay may be required *of either the employer or the labor organization, depending upon which is responsible* for the discrimination suffered by the employee." (Italics ours.)

While it may not be reasonable to argue as was done in the *Union Starch* case that, *assuming* both parties are *equally* responsible, the Board has power to require back pay of only one, it is just as unreasonable to argue that the above language was intended to permit the Board uniformly to require back pay of both parties in all cases or in any case when in fact only one party has affirmatively caused the discrimination and the other party has attempted to resist it.

Therefore it seems obvious that if the Board has laid down a rule that in every case where the union has caused the employer to discriminate against a union, the Board will hold both the union and the employer jointly and severally liable for the back pay, the language of Section 10(c) of the statute has been nullified by the Board. This is exactly what the Board has done.

The Board has, in apparent disregard of the mandate of the statute, not only found that both the employer and the union were responsible for the discrimination in *every* case to come before it, but has deliberately announced the rule *that it will so find in every case.*

In the matter of *H. M. Newman,* 85 NLRB, Case No. 132, at page 725, the Board found that the union had violated the statute by its insistence that an employee be laid off because he was delinquent in his union dues and by the union's refusal to permit other drivers to operate Newman's trucks unless the employee were laid off, and it was also found that by

yielding to the union's insistence the employer had violated the statute.

In the discussion of the remedy the Board said as follows:

> "The Trial Examiner found that although the Respondent Employer was primarily responsible for the lay-off of Fritz, Newman would not have laid him off if not for the pressure of the Union and that, under these circumstances, the Employer and the Union were jointly and severally liable for back pay. Although we agree with the Trial Examiner's conclusion, we reject his finding that the Employer was primarily responsible for the discrimination against Fritz.
>
> "*The Act makes no distinction between primary and secondary responsibility for discriminatory treatment of an employee.* It merely provides, in Section 10(c) that: (Italics ours.)
>
> "'* * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act: *Provided, that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him.* * * * (Emphasis added.)"

After further discussion the Board continued:

"The provision of Section 10(c) which states that, in an unfair labor practice proceeding, 'back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered' by an employee, confirms and extends the broad discretion which has always vested in the Board to determine which of the means available to it to employ to remedy unfair labor practices. Therefore, where, as here, the Board finds that an employer and a labor organization are *both* responsible for the discrimination against an employee, the Board's back-pay order may be directed against both. *As we have found that both the Respondent Employer and the Respondent Union were responsible for the discrimination* suffered by Fritz, we shall order them jointly and severally to make him whole for any loss of pay which he suffered by reason of the discrimination against him." (Italics ours.)

The footnote to such discussion reads as follows:

"Compare the rule generally applicable in tort actions that, 'each of two or more persons whose tortious conduct is a legal cause of harm to another is liable to the other for the entire harm.' *Restatement of the Law*—Torts, Vol. IV Sec. 875. 'For harm resulting to a third person from the tortious conduct of another, a person is liable if he (a) orders or induces such conduct knowing of the conditions under which the act is done or intending the consequences which ensue, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the

other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.' *Ibid.,* Sec. 876. 'A person whose tortious conduct is otherwise one of the legal causes of an injurious result is not relieved from liability for the entire harm by the fact that the tortious act of another responsible person contributes to the result. Nor are the damages against him thereby diminished. This is true where both are simultaneously negligent and also where the act of one either occurs or takes harmful effect after that of the other. It is immaterial that as between the two, one of them was primarily at fault for causing the harm or that the other, upon payment of damages, would have indemnity against him.' *Ibid.,* Sec. 879."

The same line of reasoning is carried forward into the concluding footnote in the brief filed on behalf of the Board in the case now before this Court. For convenience, we quote the footnote which reads as follows:

"cf. The rule commonly applied in the field of torts that when the acts of two or more persons result in a legal wrong all of the tort feasors are jointly and severally responsible for the entire damages without regard to which of them initiated the wrong even though one of them may have acted under duress." (Restatement of the Law—Torts, Vol. IV, Sec. 879.)

The analogy which the Board attempts to make to the case of joint and tort feasors is not well drawn. It has repeatedly been decided by the Supreme Court

of the United States, by this Court, and by the Board itself, that the rights being enforced under the National Labor Management Relations Act are not *private* rights but are *public* rights. Therefore, if, as a matter of policy in enforcing these public rights, the Congress deems that the policy of the statute will be best effectuated by imposing the entire liability for back pay upon whichever of the two parties is responsible for the discrimination, this is a direction in plain language which the Board must follow and cannot avoid by reliance on the analogy to private rights and the liabilities of joint tort feasors.

But the General Counsel goes considerably further than even this position of the Board and insists that the Board has the right in its sole discretion to assess the entire back pay *against whichever of the parties it chooses.* We quote from General Counsel's opposition to the motion to remand, previously argued before this Court in this case, which quotation appears at pages 57 and 58 thereof and reads as follows:

> "The Board as the agency exclusively vested with the responsibility for the effectuation of the policies of the Act, has the corresponding responsibility of making its own administrative determination of how and against whom to proceed. This is so at all stages of the proceeding, from the issuance of the complaint, the rendition of the order, the institution of enforcement proceedings, and thereafter of contempt proceedings. *Amalgamated Uitlity Workers v. Consolidated Edison Co.,* 309 U.S. 261, 265. This Court, in reliance on such cases as *Consolidated Edison Co.* and *N.L.R.B. v. Indiana and Michigan Electric*

> *Co.,* 318 U.S. 9, 18, 19, has upheld the Board's right to determine administratively the manner and extent to which it may proceed in discharge of its function in administering the Act. *N.L.R.B. v. Haleston Drug,* 187 F. (2d) 418 (C.A. 9), certiorari denied 28 LRRM 25. It would seem clear from the *Amalgamated Utility* case, *supra,* that even if the Board had issued an order against I.L.W.U. instead of Contract Guards it would still be within the Board's administrative discretion to determine whether to proceed against Pinkerton's alone, I.L.W.U. alone, or both; and also in the event of a decree against both, it would still have the option to proceed against both or either (id.)."

It is respectfully submitted that the conclusions which the General Counsel draws from the cases cited in the above excerpt are not warranted by the decisions themselves.

Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. at p. 261, held that private parties are without standing to enforce the Board's orders.

That portion of the opinion in *N.L.R.B. v. Indiana and Michigan Electric Co.,* 318 U.S. 9 at p. 18, obviously relied upon by the General Counsel in the above quotation, merely declared that the Board is not required by the statute to move on every charge. It is merely enabled to do so.

The decision of this Court in *N.L.R.B. v. Haleston Drug,* 187 F. (2d) 418, was to the effect that the Board in its administrative discretion may decline to proceed where the Board has concluded that such

proceeding would not effectuate the purposes of the Act. In that case this Court said in part as follows:

> "By the express language of Section 10(a) the Board was and still is empowered (not directed) to prevent persons from engaging in unfair labor practices affecting commerce. Its discretionary authority in respect of its assertion of jurisdiction was never, so far as we are informed, questioned under the Act as it existed prior to 1947. In *NLRB v. I. & M. Electric Co.,* 318 U.S. 9, the Court noted that 'the Board has wide discretion in the issue of complaints * * *. It is not required by the statute to move on every charge; it is merely enabled to do so. * * *.' "

From these decisions the General Counsel reasons,

> "* * *. It would still be within the Board's administrative discretion to determine whether to proceed against Pinkerton's alone, I.L.W.U. alone, or both; and also *in the event of a decree against both it would still have the option to proceed against both or either.*" (Italics ours.)

But while the statute, in "empowering but not directing" the Board to prevent unfair labor practices, clothes the Board with a wide discretion as to whether to assert jurisdiction or institute proceedings, this is not the intent or purpose of the portion of the statute dealing with the subject of back pay. The statute declares that the party *responsible* for the discrimination shall be liable for the back pay. If one of these two parties is responsible for the discrimination we do not see how or in what manner the Board is given the discretion or empowered by

the statute to assess back pay against the other party, either jointly or severally.

In short, we submit that if Section 10(c) does not require the Board to assess the entire liability for back pay upon the union in this case there is no case in which it would, and the words of the statute are meaningless.

THE STENHOUSE CASE.

What has been said here by way of argument concerning the application and interpretation of Section 10(c) of the statute applies equally to all of the four employees involved.

It is obvious that the union threatened to strike if Stenhouse were re-employed and that when the strike was actually called by the union its purpose was not limited to compelling the discharge of the three other complainants but was for the purpose of preventing the employment of Stenhouse or anyone else in good standing with the union. The strike was just as much a strike against the re-employment of Stenhouse as it was to secure the discharge of the three other complainants.

On such set of facts the Trial Examiner found the employer and the union jointly and severally liable for the discrimination against all four complainants, but the Board overruled or reversed the Trial Examiner upon the ground that the complaint did not allege that the union was responsible for Stenhouse's discharge (R. p. 79), and concluded:

> "We are not warranted in going beyond the complaint to find on the record as it exists that the Organizing Committee violated Section 8 (b) (2) by inducing Pinkerton's to discharge Stenhouse." (R. p. 80.)

The Board therefore relies on its own failure to issue a complaint against the union as a justification for imposing the entire liability for back pay against the employer in the *Stenhouse* case.

In fact, so far as we know, the Board has uniformly followed the principle of assessing the entire amount of back pay against either the union or the employer if it was the only party before the Board. For example, see *N. & Pencil Workers Union,* 91 NLRB 155, 26 LRRM 1583, where the Board said:

> "As the employer, who is not a respondent, has sole control over the employment of its employees, we cannot order that Becker be reinstated. We can, however, order the respondent union to take such action as is within its power to remove the barrier which it has erected to Becker's employment by the employer. * * * Accordingly, we shall order the respondent (1) to pay Becker a sum of money equal to the amount that she would normally have earned as wages. * * *"

See also *Insulators & Asbestos Workers Union,* 92 NLRB 753, Case No. 134, 27 LRRM 1145, where the union, which was the sole defendant, was found guilty of causing the employer to discriminate against six

employees and was, in addition, ordered to make them whole for any loss of back pay.

A still more recent case is that of *National Labor Relations Board v. United Automobile Workers, CIO,* 29 LRRM 2433, where the United States Court of Appeals for the Seventh Circuit enforced the order of the Board. In this case the Board found that the union had caused the employer to discriminate against an employee, and, the union being the sole defendant, the Board ordered the union to make the employee whole.

On the other hand, where the employer is the sole defendant before the Board, the Board has directed that the employer be solely and entirely responsible for all back pay due. In the case of *General Electric X-Ray Corporation,* 76 NLRB at p. 64, the employer raised the defense that Section 10(c) requires that the Board assess the back pay against the party "responsible" for the discrimination, but the Board replied:

> "The respondent is the only person alleged in the complaint to have committed an unfair labor practice. *It is the only person that can be deemed responsible for the discrimination found."* (Italics ours.)

Thus it appears that the Board enforces the entire liability for back pay against whichever party happens to be before it. This, it is submitted, is not in accordance with the requirements of Section 10(c)

of the statute, which declares that the party *responsible* for the discrimination shall be liable for the back pay.

The fact that only one party is before the Board *is the result of the Board's own action.* It is the result of an administrative determination made by the Board in advance of the trial and it is on the basis of such administrative determination before either party has had a fair hearing and a trial that the Board endeavors to enforce its rule assessing the entire liability against whichever party is before the Board.

Whatever may be the rule as to the discretion of the Board in issuing or not issuing a complaint against an employer in a case where the union has caused the employer to discriminate against an employee (as in the case of *National Labor Relations Board v. Auto Workers, supra*), we do not believe that the provisions of Section 10 (c) of the statute permit the Board in such case to issue a complaint against the employer only. Such would negate the requirements and intent of Section 10 (c) of the statute with respect to back pay. The Board is limited in such case to ordering reinstatement by the employer, but without back pay.

In the *Stenhouse* case the matter should be remanded to the Board with directions to issue a complaint against the union and with instructions to find whether the employer and the union were both re-

sponsible for the discrimination or whether only one was responsible for such discrimination.

CONCLUSION.

1. On the uncontradicted facts of this case the employer did its utmost to comply with the law, and the union insisted on proceeding in disregard of the law to the extent of striking the employer and threatening to put the employer out of business unless it complied with the union demands. It is therefore respectfully submitted that the statute directs that back pay be required of the union as the *only* party responsible for such discrimination.

2. There is not substantial evidence on the record considered as a whole to support a finding of the Board in this case that both the employer and the union are responsible for the discrimination or to support an order making the employer and the union jointly and severally liable for the back pay.

3. Where, upon the facts as shown by the record and the findings of the Trial Examiner, the union is responsible for the discrimination suffered by the employee Stenhouse, the Board should not be permitted to assess the back pay in such case solely against the employer by reason of the Board's own administrative determination in advance of the trial not to issue a complaint against the union. The case

should be remanded to the Board for further proceedings.

Dated, San Francisco, California,
March 10, 1952.

Respectfully submitted,
ROTH AND BAHRS,
Attorneys for Respondent
Pinkerton's National Detective Agency, Inc.

No. 12865

dec vol. 2728

United States
Court of Appeals
for the Ninth Circuit

PIOCHE MINES CONSOLIDATED, INC., PIOCHE MINES COMPANY, JOHN JANNEY and RICHARD K. BAKER,

Appellants,

vs.

FIDELITY - PHILADELPHIA TRUST COMPANY, Trustee, and E. CLARENCE MILLER and EDWARD C. DALE,

Appellees.

Transcript of Record

In Three Volumes

Volume I

(Pages 1 to 440)

Appeal from the United States District Court
for the District of Nevada

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12865

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States
in and for the District of Nevada

No. 101—Civil Action

FIDELITY - PHILADELPHIA TRUST COMPANY, Trustee, and E. CLARENCE MILLER and EDWARD C. DALE,

Plaintiffs,

vs.

PIOCHE MINES CONSOLIDATED, INC., PIOCHE MINES COMPANY and JOHN JANNEY,

Defendants.

COMPLAINT

To the Honorable, the Judge of Said Court:

Fidelity-Philadelphia Trust Company (hereinafter sometimes called "Fidelity"), Trustee, and as Trustee under an express trust created by virtue of certain agreements, supplemental agreements and modified agreements hereinafter referred to and copies of which are attached hereto, brings this action at the request and on behalf of the holders of Debentures issued by Pioche Mines Consolidated, Inc. (hereinafter sometimes called "Pioche Consolidated"), one of the defendants, as hereinafter will more particularly appear, and also as a member of a class of unsecured creditors on behalf of itself and any and all other unsecured creditors who desire to join herein and share the expenses hereof.

E. Clarence Miller and Edward C. Dale (herein-

after called "Stockholders"), both stockholders of Pioche Consolidated, bring this action on behalf of themselves and any and all other stockholders who desire to join herein and share the expenses hereof.

I.

Jurisdiction

Jurisdiction is founded on diversity of citizenship and amount.

Fidelity-Philadelphia Trust Company is a corporation incorporated under the laws of the Commonwealth of Pennsylvania, with its principal office in the City of Philadelphia, Pennsylvania, and E. Clarence Miller and Edward C. Dale are citizens and residents of said State.

Pioche Mines Consolidated, Inc., and Pioche Mines Company (hereinafter sometimes called "Mines Company") are both corporations incorporated under the laws of the State of Nevada, with their principal offices in the Town of Pioche, Lincoln County, Nevada, and John Janney is a resident of the Town of Pioche, Lincoln County, Nevada, and a citizen of said State.

The matters in controversy between each of the plaintiffs and each of the defendants exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

II.

Class Actions

Fidelity is a member of a class of unsecured creditors so numerous as to make it impracticable to bring them all before the court and this suit by Fidelity

will fairly insure the adequate representation of all creditors of the same class in that the appointment of a receiver of the properties is sought for the purpose of adjudicating the claims of all creditors.

* * * * *

Each of the plaintiffs has a several claim against each of the defendants. The object of the action is the adjudication of claims which do or may affect specific property involved in the action, and there are common questions of law or fact affecting the several rights, and a common relief is sought.

* * * * *

IV.

Parties

A. Fidelity.

Fidelity is Trustee under Agreement dated as of January 2, 1929, with Pioche Consolidated (a copy of which is attached hereto, marked Exhibit "A") which provides for the issue of $500,000. of Five Year Seven Per Cent Convertible Debentures maturing January 1, 1934 (hereinafter referred to as "Debentures of '29"). Two Supplemental Trust Agreements were entered into between said parties, one dated August 31, 1932 (a copy of which is attached hereto, marked Exhibit "B") and the other dated April 1, 1936 (a copy of which is attached hereto, marked Exhibit "C"). Debentures to the aggregate principal amount of $476,300. have been certified by Fidelity under said Agreement and Supplemental Agreements and delivered to Pioche Consolidated, and still remain outstanding and unpaid.

Fidelity is also Trustee under Agreement dated

as of October 1, 1930, with Pioche Consolidated (a copy of which is attached hereto, marked Exhibit "D") which provides for the issue of $1,000,000. of Convertible Seven Per cent Sinking Fund Gold Debentures maturing October 1, 1937 (hereinafter referred to as "Debentures of '30"). Two Supplemental Trust Agreements were entered into between said parties, one dated August 31, 1932 (a copy of which is attached hereto, marked Exhibit "E") and the other dated April 1, 1936 (a copy of which is attached hereto, marked Exhibit "F"). Debentures to the aggregate principal amount of $211,000. have been certified by Fidelity under said Agreement and Supplemental Agreements and delivered to Pioche Consolidated, and still remain outstanding and unpaid.

At the request of Pioche Consolidated a very large majority of the debentureholders gave that company the option to issue scrip in exchange for coupons commencing with the coupons dated July 1, 1931 and extending down to and including the coupons dated July 1, 1937 (see debentureholders agreement attached to Exhibits "B" and "E"). The company elected to make the exchange on each of the maturity dates included in said period and of the $273,626.50 of interest coupons maturing within the dates named, $269,503.50 have actually been exchanged. As provided in the scrip certificates, the coupons so exchanged have been kept alive for the protection of the scrip holders. The scrip certificates originally issued were payable on January 1, 1934 but have twice been extended, the second extension

being until October 1, 1941—the extended due date of the debentures of both issues. (A copy of the scrip certificate in its extended form is attached hereto marked Exhibit "G").

Pioche Consolidated has defaulted in the payment of the coupons appertaining to the Debentures of '29 which matured on January 1 and July 1, 1938, January 1 and July 1, 1939, and January 1, 1940, and also the coupons appertaining to the Debentures of '30 which matured on April 1 and October 1, 1938 and April 1 and October 1, 1939. Fidelity, Trustee as aforesaid, in accordance with the provisions of said Agreements and Supplemental Trust Agreements, upon the Written Request of the holders of more than 50% in aggregate principal amount of the outstanding Debentures of each of said issues (a copy of which is attached hereto, marked Exhibit "H") on or about June 21, 1939 gave written notice to Pioche Consolidated declaring the principal of all of the outstanding Debentures of both of said issues to be due and payable immediately and made written demand upon Pioche Consolidated for the payment to Fidelity, for the benefit of the holders of the Debentures and interest coupons then outstanding, of the whole amount due and payable on all such outstanding Debentures of both issues and the interest coupons appertaining thereto, with interest upon overdue instalments of interest at the rate of 7% per annum, and in addition thereto, such further amounts as shall be sufficient to cover costs and expenses of collection, including reasonable compensation to the Trustee, its agents, attorneys

and counsel, which payment has been refused. (A copy of said Written Demand is attached hereto, marked Exhibit "I").

The holders of more than $450,000. in aggregate principal amount of the outstanding Debentures, including more than 50% of the debentures of each issue, executed and delivered to Fidelity Pioche Debenture-holders' Agreement dated as of February 1, 1939 (a copy of which is attached hereto, marked Exhibit "J", and which is hereinafter referred to as "Debenture-holders' Agreement of February 1, 1939") by which, among other things, they requested Fidelity, if Pioche Consolidated failed to pay the amounts due forthwith upon demand, to institute such action or actions, proceeding or proceedings at law or in equity, as may be advised by counsel for the protection of the debenture-holders, and the collection of the sums so due and unpaid as provided in the said two Trust Agreements. By this Debenture-holders' Agreement a Debenture-holders' Committee composed of Percy H. Clark, Chairman, Albert P. Gerhard and Robert F. Holden was appointed. The powers of the Committee were defined and Fidelity was directed not to bring suit until the Committee should have a reasonable time within which to negotiate an arrangement or settlement in the manner provided in the Agreement. This Complaint has been filed pursuant to the request of the Debenture-holders' Committee.

* * * * *

V.

History Prior to Consolidation

1. The properties now owned or controlled by Pioche Consolidated were originally assembled by the Exploration Syndicate. John Janney was and still is the representative and leader of this group. Sometime in 1907 this group organized the Pioche Mines Company, which purchased the West End group of mining claims located to the west of the Town of Pioche by the issue of part of its authorized stock to the Syndicate. At a latter date the Syndicate conveyed the Wide Awake Mine located to the east of the Town of Pioche, to Mines Company and at a still later date started the construction of a mill on a site adjoining the Pioche Railway Station of the Union Pacific Railroad. Mines Company for some years financed its requirements by the sale of treasury shares, and when these shares became exhausted, by the sale of shares loaned to it by the Exploration Syndicate. By the Fall of 1928 Mines Company was unable to raise additional funds, having exhausted all of its treasury stock and being indebted to the Exploration Syndicate to the amount of $380,826.94. The Exploration Syndicate by that time had acquired the following additional groups of claims: The Poorman and Toledo-Pioche groups located east of Pioche; Nevada-Des Moines group located north of Pioche; and the Gold Crown group, located west of Pioche; and also a lease from Amalgamated Pioche Mines and Smelters Corporation, Limited (hereinafter referred to as "Amalgamated") of the properties comprising the Early Day Mines of Pioche located to the south of Pioche. The partly

completed mill was owned 51% by Mines Company and 49% by the Syndicate which had erected a tramway connecting the mill with the Early Mines leased from Amalgamated. The Syndicate had also acquired a large controlling interest in the capital stock of Nevada Volcano Mines Company, which owned the Volcano group of claims located adjoining the Wide Awake Mine and the Toledo-Pioche group of claims to the East of Pioche, and this stock was held by John Janney under an unrecorded declaration of trust (known as the Volcano Trust) for the benefit of the stockholders of Pioche Mines Company. (See paragraphs VI and XII B of this Complaint). (Copies of said Declaration of Trust dated July 15, 1920, and the amended Declaration of Trust dated February 24, 1925, are attached hereto, marked Exhibit "K").

VI.

Consolidation

In December, 1928 a consolidation plan was agreed upon by parties representing the Mines Company, the Exploration Syndicate and others, which provided for (a) the incorporation of a new company to be called Pioche Mines Consolidated, Inc. with an authorized capital stock of 2,500,000 shares of the par value of $5. each; (b) the issue of 1,000,000 shares of said stock for the purchase of the properties and claims of the Syndicate, including the Syndicate's claim of $380,826.94 against Mines Company, which the plan provided should be held until such time as all of the Mines Company shares shall be acquired by Pioche Consolidated, when the ob-

ligation shall be cancelled (said claim is hereinafter referred to as the "$380,826.94 claim"); (c) the setting aside of 1,000,000 shares of stock to be offered in exchange for the outstanding 1,000,000 shares of stock of Mines Company to which the right to the Nevada Volcano Mines Company stock held under the Volcano Trust attached (see end of paragraph V and also paragraph XII-B of this Complaint); and (d) the balance of the authorized capital stock amounting to 500,000 shares to be held for the conversion of debentures and for future financing.

* * * * *

VIII.

Financing

The operations of the Consolidated enterprise were brought to an abrupt close on September 16, 1929, when the mill was partly destroyed by fire. This catastrophe, coming as it did at the beginning of the depression, left the Company in bad financial condition.

Efforts were made from time to time to raise funds first by the sale of convertible Debentures of '30, and later by borrowing on open book account and on notes and by sales of stock. The mill building was reconstructed after the sale of the Debentures of '30 but it has never been equipped to operate on a commercial basis. A number of small subscriptions to the capital stock has been received and Pioche Consolidated has borrowed very substantial sums from time to time, the exact amounts of which are unknown to plaintiffs, but the maintenance of an organization in Pioche absorbed the money as fast as it came in and there never has been a suf-

ficient amount on hand at any one time to finance the construction and development work which constitute the necessary prerequisite to placing the Company in production on a commercial basis. This method of hand to mouth financing has proven entirely inadequate to meet the financial requirements of the Company, and very expensive.

In 1933 the Daly East gold vein located on the Toledo-Pioche group of claims above referred to, was opened and shipments of ores from this development returned $6,961.71 in gold and $1,501.59 in silver, and later a small unit was installed in the mill, and in 1936, 1937, and the first two months of 1938, an experimental operation was conducted on a small tonnage basis which yielded net returns of over $310,000. These particular operations, as well as the whole Consolidated enterprise, have been conducted at a great loss, Pioche Consolidated and its subsidiary Mines Company are unable to pay their debts as they mature, have become insolvent and have suspended their business for want of funds to carry on the same, all of which is greatly prejudicial to the interests of their creditors and stockholders.

* * * * *

XI.

Debenture-Holders' Agreement of **February 1, 1939**

No report having been made to the debenture-holders by the Company subsequent to the issue of the Reorganization Agreement and Plan of January 26, 1938, a group of debenture-holders held a meeting in December, 1938, and determined to take

action for the protection of their interests. As a result of the meeting Debenture-holders' Agreement of February 1, 1939 (Exhibit "J" hereto) was prepared and became operative when it had been signed by the holders of more than 50% of the outstanding debentures of each of the two issues above referred to. The original counterparts of said Agreement, signed by the holders of over $450,000. of debentures, have been delivered to Fidelity in accordance with its terms, and $514,100. of debentures, $269,-503.50 of overdue coupons held as security for outstanding scrip and $223,772.50 of scrip have been deposited with Fidelity, to be held under said Agreement.

The Debenture-holders' Committee named in said Agreement held several meetings in April and May, 1939, with John Janney and others, and all parties agreed it would be for the best interests of all concerned, including debenture-holders, other creditors and stockholders, to avoid litigation and to negotiate an agreement for the recapitalization and financing of the Company. At the request of the Committee John Janney agreed to an audit of the accounts and records by Barrow, Wade, Guthrie & Co., public accountants, and to an examination of the legal titles, and he later approved of Messrs. Ham and Taylor, attorneys of Las Vegas, to make the title examination. Janney asked for time within which to prepare for these examinations and went to Pioche on or about June 23, 1939, but was not ready for the examination until October. The report of the accountants was received by the Committee early in November, but the final report of the title attorneys

was not received until about the middle of December. The reports disclose gross mismanagement and waste and John Janney has again failed to make a full disclosure of material facts as requested by the Committee and has failed to cooperate with them in other respects. The Committee, having decided that nothing will be accomplished by further delay, requested Fidelity and Stockholders to bring suit and this Complaint is in response to that request.

XII.

Mismanagement

* * * * *

E. The $380,826.94 Claim.

On or about December 3, 1938, when Mines Company owed Pioche Consolidated the above mentioned $380,826.94 claim, the dummy Board of Directors of Pioche Consolidated passed a resolution waiving, postponing and extending all obligations owing to it by Mines Company until after Mines Company shall be fully repaid sums of money it had borrowed or would borrow to lend to Pioche Consolidated. On said date the said John Janney, and R. K. Baker of Boston, Massachusetts were creditors of Mines Company on account of advances theretofore made by them through Mines Company to Pioche Consolidated, and on said date Pioche Consolidated and Mines Company were unable to pay their debts as they matured, were insolvent, or their insolvency was imminent. Thus the aforesaid postponement of the $380,826.94 claim of Pioche Consolidated against Mines Company constitutes illegal preference in favor of said John Janney and R. K. Baker and should be set aside.

The above-mentioned failure of the said John Janney as President of Pioche Consolidated and his dummy Board of Directors to maintain and not subordinate the above-mentioned claim of $380,826.94 against Mines Company constitutes wilful and wrongful mismanagement of said Pioche Consolidated.

* * * * *

XIV.

Pioche Consolidated's Debt to Fidelity

In accordance with the Supplemental Trust Agreements above referred to, and the Debenture-holders' Agreement and other documents attached thereto, and the elections exercised by Pioche Consolidated thereunder, the maturity dates of the Debentures of '29 and the Debentures of '30 were extended to October 1, 1941, and the coupons appertaining to said Debentures of both issues commencing with the coupons which became due on July 1, 1931, down to and including July 1, 1937, were exchanged for scrip issued by Pioche Consolidated, which operated to extend the instalments of interest represented by said coupons to October 1, 1941, the extended date of maturity of both sets of Debentures. When the Debentures were declared due and payable by Fidelity the scrip, according to its terms, became due and payable at the same time. The coupons exchanged for scrip were held alive for the protection of the scrip, as provided for in the scrip certificate, and the coupons so surrendered in exchange are now held by Fidelity, together with a very large majority of the outstanding Debentures and the scrip apper-

taining thereto, under the Debenture-holders' Agreement dated as of February 1, 1939 (Exhibit "J" hereto).

Fidelity alleges that the sum of $100,000. is a reasonable amount to be allowed to cover compensation, costs and expenses of Fidelity and of Debenture-holders' Committee appointed by Debenture-holders' Agreement dated as of February 1, 1939 (Exhibit "J" hereto) including attorneys' fees, as well as any and all liabilities incurred by Fidelity as Trustee under the Trust Agreement dated January 2, 1929 (Exhibit "A" hereto) and Supplemental Agreements thereto, and the Trust Agreement dated October 1, 1930 (Exhibit "D" hereto) and Supplemental Agreements thereto.

Wherefore, Fidelity claims there is justly due and owing by Pioche Consolidated, Inc. to it the following sums:

PRINCIPAL:		
Debentures of '29	$476,300.	
Debentures of '30	211,000.	
Total		$ 687,300.00
INTEREST:		
Interest on Debentures of '29 payable on January 1 and July 1 in each year at the rate of seven per cent per annum, each instalment amounting to $16,670.50, the total amount due for the unpaid instalments commencing with the instalment due July 1, 1931 and continuing down to and including the instalment due January 1, 1940, amounts to		300,069.00

Interest on Debentures of '30 payable on April 1 and October 1 in each year at the rate of seven per cent per annum, each instalment amounting to $7,385., the total amount due for the unpaid instalments commencing with the instalment due October 1, 1931 and continuing down to and including the instalment due October 1, 1939 (not including the instalment due October 1, 1937 which was paid in cash) amounts to	118,160.00
Interest on Debentures of '30—October 1, 1939 to January 1, 1940	3,692.50
Interest on overdue instalments of interest calculated down to January 1, 1940	125,457.03
Allowance to cover the compensation, costs and expenses of Fidelity, and the costs and expenses of Debenture-holders' Committee, including attorneys' fees, as well as any and all liabilities incurred by Fidelity, as Trustee under the said two Trust Agreements and the Supplemental Agreements thereto....	100,000.00
Total amount due and owing to Fidelity as of January 1, 1940	$1,334,678.53

In addition to the total amount above set forth, Fidelity will be entitled to receive from Pioche Mines Consolidated, Inc., additional interest on the principal amount of Debentures and on overdue instalments of interest down to the date of judgment.

* * * * *

XVII.

Stockholders' Claims

* * * * *

Stockholders, on behalf of themselves and all other stockholders, assert the following claims in a secondary capacity (more particularly defined in paragraph II of this Complaint) on behalf of Pioche Consolidated.

(a) that Mines Company pay to Pioche Consolidated the sum of $380,826.94, plus interest at the rate of 7% per annum from December 26, 1928, to

date of payment and any and all other sums that shall be found to be due to it by Mines Company.

* * * * *

Wherefore, plaintiffs pray:

I.

That this Court appoint a suitable and competent person or persons as receiver or receivers of the defendants, Pioche Consolidated and Mines Company, and of their properties and assets, wherever found or situate, and that the Court, by its said receiver or receivers, take possession of all of said properties and assets, tangible and intangible, and that said receiver or receivers hold and administer all of said properties and assets under the orders and directions of this Court, for the benefit of the creditors of the said defendants and of their stockholders, in accordance with their respective rights and priorities, and that said receiver or receivers be authorized to carry on the business of the said defendants to such an extent as shall be necessary to secure adequate protection of all parties and as the Court may from time to time order during the pendency of this suit.

II.

That the respective claims of creditors and the respective liens and priorities thereof, if any exist, be ascertained, and that this Court enforce the rights, claims, liens and equities of all of the creditors of the said defendants as the same may be finally ascertained by this Court.

III.

That said receiver or receivers be given power to collect the assets of the said defendants, Pioche Consolidated and Mines Company, and to protect and

preserve the same for such length of time as the Court may order, so that the said assets will not be sacrificed; that said receiver or receivers be authorized to take possession of all shares of stock of subsidiary companies of the said defendants and to take such steps in connection therewith as may be necessary and proper for the conservation and administration and preservation of the assets of such subsidiaries.

IV.

That temporarily and pending this suit and until further order of this Court, the said defendants, Pioche Consolidated and Mines Company, their agents, servants and employees, officers and directors, and all persons claiming to act by, through or under the said defendants and all other persons, be restrained from interfering with the taking of possession or the possession of the property and assets of the said defendants in the hands of the receiver or receivers and the acts of the receiver or receivers.

V.

That said defendants, Pioche Consolidated and Mines Company, and John Janney be ordered to assign, transfer and set over to the receiver or receivers appointed by this Court all Pioche Consolidated and Mines Company properties and assets of every kind and nature, including all shares of stock of subsidiaries of the said defendant.

VI.

That this Court enter its order directing that shares of stock of Mines Company be issued in the name of Pioche Consolidated in such amount as shall

be shown to be due and that certificates representing said stock be delivered to said receiver, or to Pioche Consolidated, as this Court shall determine.

VII.

That this Court enter its order directing John Janney to dissolve the so-called Volcano Trust and requiring him to transfer the shares of stock of Nevada-Volcano Mines Company held in said Trust into the name of Pioche Consolidated, and to deliver certificates representing such shares to the receiver, or to Pioche Consolidated, as this Court shall determine.

VIII.

That this Court shall enter its order directing John Janney to convey the mill site to Pioche Consolidated.

IX.

That this Court enter its decree setting aside as fraudulent the conveyance by Mines Company by deed dated August 8, 1938, of Lots 14, 15, 16 and 17, Block 1 of Lots and Block Delineated on the Official Map of the Town of Pioche, to John Janney.

X.

That this Court set aside as an attempt to give illegal preference to creditors, the resolution adopted December 3, 1938 by the Board of Directors of Pioche Consolidated, waiving, postponing and extending the claims (including particularly the $380,-826.94 claim) of Pioche Consolidated against Mines Company.

XI.

That Fidelity-Philadelphia Trust Company have judgment against Pioche Consolidated for the

amount of its claim, as set forth in Paragraph XIV above, together with interest on such sum from January 1, 1940, to date of payment.

XII.

That Pioche Consolidated have judgment against Mines Company for the amount of $380,826.94, plus interest from December 26, 1928, at the rate of 7% per annum, and such other amounts as shall be found to be due.

XIII.

That plaintiffs, and each of them, have such other and further relief in the premises as may be just and proper and as circumstances of the case may in equity require.

/s/ THATCHER & WOODBURN,
/s/ GEO. B. THATCHER,
/s/ CLARK, HEBARD & SPAHR,
/s/ PERCY H. CLARK

Duly Verified.

EXHIBIT "A"

This Agreement, made as of the second day of January, 1929, between Pioche Mines Consolidated, Inc., a corporation organized and existing under the laws of the State of Nevada (hereinafter called the "Company"), party of the first part, and Fidelity-Philadelphia Trust Company, a corporation organized and existing under the laws of the State of Pennsylvania (hereinafter called "Trustee"), party of the second part.

Whereas, the Company has deemed it necessary

Exhibit "A"—(Continued)

to borrow money for its corporate purposes and to that end has duly determined to issue its Debenture Bonds, not exceeding the aggregate principal amount of Five Hundred Thousand Dollars, to be designated as its "Five Year Seven Per Cent. Convertible Debentures" (hereinafter referred to as "Bonds"), to be dated as of January 2, 1929, to mature January 1, 1934, to bear interest from January 1, 1929, at the rate of seven per cent. (7%) per annum, payable semi-annually on January 1 and July 1 in each year, both principal and interest to be payable at the office of Fidelity-Philadelphia Trust Company, in the City of Philadelphia, Pennsylvania, and all the Bonds to be signed in the name of the Company by its President or a Vice-President, to be impressed with its corporate seal, attested by its Secretary or an Assistant Secretary, and to be authenticated by the certificate of the Trustee endorsed thereon, and to have interest coupons attached, executed with the facsimile signature of its Treasurer, and to be issued pursuant to terms and conditions set forth in this Trust Agreement, which Bonds, interest coupons and Trustee's certificate are to be substantially in the following forms, respectively:

No. (Form of Bond) $

United States of America
State of Nevada

Pioche Mines Consolidated Inc.

Five Year Seven Per Cent. Convertible Debenture

Pioche Mines Consolidated, Inc., a corporation of

Exhibit "A"—(Continued)

the State of Nevada (hereinafter called the "Company"), For Value Received, promises to pay to Bearer (or, if this Debenture be registered, to the registered owner hereof), the principal sum of..... Dollars on January 1, 1934, and to pay interest thereon from January 1, 1929, at the rate of seven per cent. per annum, semi-annually on January 1 and July 1 of each year. Any such interest falling due at or before the maturity of this Debenture shall be paid only upon presentation and surrender of the attached interest coupons as they severally mature.

Both principal and interest of this Debenture are payable at the office of the Trustee hereinafter named, in the City of Philadelphia, Pennsylvania, in gold coin of the United States of America of or equal to the standard of weight and fineness existing January 1, 1929, without deduction for any Federal income tax on or in respect to such interest, which the Company or its paying agents may be required or permitted to pay thereon or to retain or deduct therefrom under any present or future law of the United States of America, up to but not in excess of, 2 per cent. of such interest.

This is one of an issue of Debentures of the Company, all of like date and similar tenor, except as to the denomination thereof, not exceeding the aggregate principal amount of $500,000., all issued pursuant to a certain Trust Agreement, dated as of January 2, 1929, executed between the Company and Fidelity-Philadelphia Trust Company, of Philadel-

Exhibit "A"—(Continued)

phia, as Trustee, to which Trust Agreement reference is hereby made for the terms thereof. To the extent provided in the said Trust Agreement, all rights of action upon this Debenture prior to January 1, 1934, are vested in the Trustee.

In the manner provided in the said Trust Agreement, this Debenture may be redeemed, at the option of the Company, on any interest date, upon thirty days' prior notice, at a redemption price equivalent to one hundred and five per cent. (105%) of the principal amount hereof and accrued interest to the date of redemption.

This Debenture shall pass by delivery until registered in the owner's name at the office of the Trustee, such registration being noted hereon. After such registration no further transfer hereof shall be valid unless made at the said office by the registered owner in person or by duly authorized attorney and similarly noted hereon; but this Debenture may be discharged from registry by being in like manner transferred to bearer, and thereupon transferability by delivery shall be restored. This Debenture shall continue to be subject to successive registrations and transfers to bearer, at the option of the owner; but no registration shall affect the negotiability of the attached interest coupons, which shall continue to be payable to bearer and transferable by delivery merely.

In the manner and with the effect provided in the said Trust Agreement, the principal of all the

Exhibit "A"—(Continued)

said Debentures at any time issued and outstanding may be declared, or may become, due and payable before maturity upon the happening of one or more of the events described in the said Trust Agreement.

The Debentures of this series shall be convertible at the option of the holders at any time prior to maturity into the Common Stock (as constituted on January 1, 1929) of the Company in the manner prescribed in the said Trust Agreement, upon giving twenty days' notice as therein provided, at the rate for each One Hundred Dollars ($100.) face value of Debentures, with all unmatured coupons attached of 40 shares of stock to and including January 1, 1931, of 35 shares of stock from January 2, 1931, to and including January 1, 1933, and of 30 shares of stock from January 2, 1933, to and including January 1, 1934, the date of maturity. At the time of such conversion any difference between the accrued interests on the Debentures and the accruing dividends on the stock, if a cash dividend has been declared within six months prior to such conversion, shall be adjusted in cash, said dividends to be computed at the rate per annum of said last previous cash dividend; but if no cash dividend has been paid within said period of six months, the conversion shall be made at the above rate for Debentures and stock without any allowance for interest or dividends. In case this Debenture is called for redemption, the holder hereof may still exercise his right of con-

Exhibit "A"—(Continued)

version, provided he gives the required notice at least twenty days prior to the date fixed for redemption.

No recourse shall be had for the payment of any part of either principal or interest of this Debenture, or for any claim based hereon or thereon, or otherwise in any manner in respect hereof or in respect of the said Trust Agreement, or of the indebtedness represented hereby, to or against any incorporator, stockholder, officer or director, past, present or future, of the Company or of any predecessor, or successor corporation, either directly or through the Company or any such predecessor or successor corporation, whether by virtue of any statute or constitutional provision or rule of law, or by the enforcement of any assessment or penalty or otherwise, or in any manner; all such liability, by the acceptance hereof, and as part of the consideration for the issue hereof, being expressly released, as provided in the said Trust Agreement.

This Debenture shall not be valid or obligatory for any purpose until authenticated by the execution by the Trustee of the certificate endorsed hereon.

In Witness Whereof, the Company has caused this Debenture to be signed in its corporate name by its President or a Vice-President and impressed with its corporate seal, attested by its Secretary or an Assistant Secretary, and the attached interest

Exhibit "A"—(Continued)

coupons to be executed with the facsimile signature of its Treasurer, as of January 2, 1929.

PIOCHE MINES CONSOLIDATED, INC.,

By .....
President.

Attest:

.....
Secretary

No. (Form of Interest Coupon) $

On the first day of , 19 , unless the Debenture herein mentioned shall have been called for redemption on or prior to such date, Pioche Mines Consolidated, Inc., will pay to Bearer at the office of Fidelity-Philadelphia Trust Company, in the City of Philadelphia and State of Pennsylvania,

Dollars in United States gold coin, without deduction for any Federal income tax thereon or in respect thereto, up to, but not in excess of 2 per cent. of the said sum, being six months' interest then due on its Five Year Seven Per Cent. Convertible Debenture No.

.....
Treasurer.

Exhibit "A"—(Continued)
(Form of Trustee's Certificate)

This is one of the Debentures described in the within-mentioned Trust Agreement.

FIDELITY-PHILADELPHIA TRUST COMPANY, Trustee

By .....
Vice-President.

And Whereas, all things necessary to make the Bonds, when duly authenticated by the Trustee, the valid, binding and legal obligations of the Company, and the execution and delivery of this Agreement and the issue of the Bonds, as in this Agreement provided, have been in all respects duly authorized;

Now, Therefore, This Agreement Witnesseth: That in consideration of the premises and of the purchase or acceptance of the Bonds by those who shall hold the same from time to time, and of the sum of One Dollar by each of the parties hereto to the other duly paid, the receipt whereof is hereby acknowledged, The Parties Hereto Hereby Covenant and Agree, for the equal benefit, security and protection of the legal holders of the Bonds and the interest coupons pertaining thereto, without preference of any of the Bonds or interest coupons over any of the others by reason of priority in the time of issue, sale or negotiation thereof, or otherwise for any cause whatever, except as otherwise provided in Section 8 hereof, as follows:

Exhibit "A"—(Continued)

Article First

Designation, Form, Issue, Authentication and Registration of Bonds

Section 1. The Bonds to be issued under this Agreement shall be designated as the Company's "Five Year Seven Per Cent. Convertible Debentures," and they and the interest coupons attached thereto shall be substantially in the forms and of the tenor hereinbefore recited, respectively.

Section 2. The Company shall execute in the manner hereinbefore recited and deliver to the Trustee from time to time not to exceed Five Hundred Thousand Dollars, aggregate principal amount, of Bonds in the denominations of $100, $500 and $1000, in such amounts as to each denomination as the Company may determine; and the Trustee shall authenticate the same and deliver the Bonds so authenticated to or upon the written order of the Company, signed by its President or a Vice President. Except as herein otherwise expressly provided with respect to the exchange or substitution of Bonds on certain contingencies, no further Bonds shall at any time be issued under this Agreement.

Only such Bonds as shall be authenticated by a certificate substantially in the form hereinbefore recited, executed by the Trustee, shall be entitled to any right or benefit under this Agreement; and such authentication by the Trustee shall be conclusive evidence, and the only competent evidence, that any

Exhibit "A"—(Continued)

outstanding Bond so authenticated has been duly issued hereunder and that the holder is entitled to the benefits hereof.

Section 3. The owner of any definitive Bond may have the ownership thereof registered at the office of the Trustee in the City of Philadelphia and State of Pennsylvania, such registration, being noted on the Bond. After such registration, no further transfer of such Bond shall be valid unless made at the said office by the registered owner in person or by duly authorized attorney and similarly noted on the Bond; but the same may be discharged from registry by being in like manner transferred to bearer, and thereupon transferability by delivery shall be restored. Bonds shall continue to be subject to successive registrations and transfers to bearer, at the option of their respective owners; but no registration of any Bond shall affect the negotiability of the interest coupons pertaining thereto, which shall continue to be payable to bearer and transferable by delivery merely.

Section 4. In case any Bond issued hereunder shall be mutilated, or destroyed, the Company, in its discretion may issue, and thereupon the Trustee shall authenticate and deliver, a new Bond of like denomination, tenor and date, in exchange and substitution for and upon the cancellation of the mutilated Bond and its interest coupons, or in lieu of and in substitution for the Bond and its interest coupons so destroyed, upon receipt of evidence satis-

Exhibit "A"—(Continued)

factory to the Company and the Trustee of the destruction of such Bond and its interest coupons, and upon the receipt, also, of indemnity, satisfactory to them; provided, that the Company, at its option, may require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge connected with such issue, and also a further sum, not exceeding two dollars, for each Bond so issued in substitution.

Section 5. The owner of any One Hundred Dollar ($100), and/or Five Hundred Dollar ($500) Bonds of this issue may at any time surrender the same in lots of One Thousand Dollars ($1,000) each in principal amount (accompanied, if registered, by a written instrument of transfer, duly executed) with all unmatured coupons thereto belonging, to the Trustee for cancellation and exchange and thereupon the Company shall issue and the Trustee shall authenticate and deliver to such owner a Bond or Bonds of the denomination of One Thousand Dollars ($1,000) each and representing an equivalent obligation for principal and interest. There shall always be reserved uncertified a sufficient number of One Thousand Dollar ($1,000) Bonds to represent all One Hundred Dollar ($100) and Five Hundred Dollar ($500) Bonds at any time outstanding, and each One Thousand Dollars ($1,000) Bond thus issued in exchange for One Hundred ($100) and Five Hundred Dollar ($500) Bonds shall bear the lowest number reserved for that purpose.

Exhibit "A"—(Continued)

Article Second

Covenants of the Company

The Company covenants with the Trustee and the holders of the Bonds as follows:

Section 6. The Company will duly and punctually pay or cause to be paid the principal and interest of all the Bonds duly issued hereunder according to the terms thereof and of this Agreement, without deduction for any Federal income tax on or in respect to such interest, which the Company or its paying agents may be required or permitted to pay thereon or to retain or deduct therefrom under any present or future law of the United States of America, up to, but not in excess of, 2 per cent. of such interest.

Section 7. So long as any of the Bonds remain outstanding and unpaid, the Company will at all times keep an agency in the City of Philadelphia and State of Pennsylvania, where notices and demands in respect of such Bonds and of this Agreement may be served, and will, from time to time, give notice to the Trustee of the location of such agency; and, in case the Company shall fail so to do, notices may be served and demands may be made at the office of the Trustee in the City of Philadelphia and State of Pennsylvania. The Company will at all times keep or cause to be kept at the said office of the Trustee books in which the ownership of any Bonds may be registered, upon the presentation

Exhibit "A"—(Continued)

thereof for such purpose, as provided in Section 3 hereof.

Section 8. So long as any of the Bonds remain outstanding and upaid, the Company will not directly or indirectly extend or assent to the extension of the time for the payment of any interest coupon or claim for interest of or upon any Bond, and it will not directly or indirectly be a party to any arrangement therefor, either by purchasing or refunding or in any manner keeping alive such interest coupon or claim for interest, or otherwise. In case the payment of any such interest coupon or claim for interest shall be so extended by or with or without the consent of the Company, then, anything in this Agreement contained to the contrary notwithstanding, such interest coupon or claim for interest so extended shall not be entitled, in case of default hereunder, to any benefit of or from this Agreement, except after the prior payment in full of the principal of all the Bonds issued hereunder and of all such interest coupons and claims for interest as shall not have been so extended.

Section 9. So long as any of the Bonds remain outstanding and unpaid, the Company will not execute any mortgage upon, or make any pledge of, or create any lien (legal or equitable) on, any of its properties (real or personal) or on the properties of any subsidiary company, as security for any bond or bonds or funded obligations of any character, but the Company may acquire additional properties under and subject to existing mortgages.

Exhibit "A"—(Continued)

Article Third

Redemption of Bonds

Section 10. The Company at its option may redeem the Bonds outstanding hereunder on any interest date either as a whole or in part from time to time by paying therefor the par value thereof and a premium of five per cent. (5%) and all accrued interest thereon. In case the Company shall desire so to redeem less than all the Bonds outstanding on the date on which it desires to make redemption, the Company shall notify the Trustee in writing of the aggregate principal amount of the Bonds which it desires to redeem, specifying the date (which shall not be less than forty days after such notification) on which it desires to make redemption. As soon as practicable thereafter (and, in any event, within ten days) the Trustee shall determine, by lot, in any manner deemed by the Trustee to be fair, the particular serial numbers of the Bonds to be redeemed and shall certify to the Company the Serial numbers of the Bonds so determined. The Company shall thereupon cause notice of redemption to be published in one daily newspaper of general circulation published in the City of Philadelphia, State of Pennsylvania, once a week for four successive weeks, the first publication to be not less than thirty days prior to the date of such redemption, notice of such intended redemption, specifying the date of redemption, the serial numbers of the Bonds to be redeemed

Exhibit "A"—(Continued)

and requiring that the same be then surrendered at the office of the Trustee in the City of Philadelphia, State of Pennsylvania, for redemption at the said redemption price, and giving notice, also, that the interest on the Bonds so called for redemption shall cease on the designated redemption date. At least thirty days prior to the redemption date, a similar notice shall also be mailed by the Trustee, postage prepaid, to the respective registered owners of any Bonds called for redemption, at their addresses appearing on the registry books. The Company, on or before the redemption date designated in such notice, shall deposit with the Trustee an amount in cash sufficient to redeem all the Bonds designated in the notice.

In case the Company shall desire to redeem all of the Bonds outstanding on the date on which it desires to make redemption, it shall give notice thereof in like manner by publication and mailing, except that the notice need not specify the serial numbers of the Bonds to be redeemed.

Section 11. Notice of redemption having been given by publication and mailing, as provided in Section 10 hereof, the Bonds so called shall, on the date designated in such notice, become due and payable at the office of the Trustee, and, upon presentation and surrender thereof, with all interest coupons maturing on or subsequently to the redemption date, and, in the case of Bonds which shall at any time be registered, accompanied by duly executed assignments or transfer powers, such Bonds shall be paid

Exhibit "A"—(Continued)

and redeemed at the said redemption price out of the funds so deposited with the Trustee. After the date so fixed for redemption (unless the Company shall make default in providing for the payment thereof), the Bonds so called shall cease to bear further interest and thereafter said bonds shall not be entitled to any benefit of or from this agreement, but shall be entitled solely to payment out of said moneys held for their redemption by the trustee.

Section 12. All Bonds purchased or redeemed pursuant to any of the provisions of this Article Third shall forthwith be cancelled by the Trustee and delivered to or upon the written order of the Company. All expenses of any character shall be borne and paid by the Company.

Article Fourth
Conversion of Bonds

Section 13. The Bonds to be authenticated and issued under the provisions of this Trust Agreement shall be convertible, at the option of the holders, at any time prior to maturity, into the Common Stock (as constituted on January 1, 1929) of the Company, at the rate for each One Hundred Dollars ($100) face value of Bonds, with all unmatured coupons attached of 40 shares of Stock to and including January 1, 1931, of 35 shares of Stock from January 2, 1931, to and including January 1, 1933, and of 30 shares of Stock from January 2, 1933, to and including January 1, 1934, the date of ma-

Exhibit "A"—(Continued)

turity. At the time of such conversion any difference between the accrued interest on the Bonds and the accruing dividends on the Stock, if a cash dividend has been declared within six months prior to such conversion, shall be adjusted in cash, said dividends to be computed at the rate per annum of said last previous cash dividend; but if no cash dividend has been paid within said period of six months, the conversion shall be made at the above rate for Bonds and stock without any allowance for interest or dividends. In case any Bond is called for redemption, the holder thereof may still exercise his right of conversion, provided he gives written notice at least twenty days prior to the date fixed for redemption as hereinafter set forth.

Any holder of any such Bond wishing to exercise his right of conversion must, at least twenty days prior to the time when the conversion is to take place, give written notice to the Company addressed and delivered to it either at the office of the Trustee in the City of Philadelphia, State of Pennsylvania, or at the office of the Company in the Town of Pioche, State of Nevada, setting forth the intention of the bondholder to convert his Bonds, the amount of Bonds to be converted, the serial numbers thereof and the name or names in which the Stock to be issued in exchange therefor shall be issued, and must also at the time of giving such notice surrender to the Company at one or the other of said offices the Bonds to be converted, in negotiable form, with all unmatured coupons attached thereto, and the Com-

Exhibit "A"—(Continued)

pany will in due course deliver to the bondholder at the office where the bonds were surrendered certificates, registered in the name indicated, for the Stock issuable in exchange for the Bonds surrendered. The Company will deliver all Bonds so surrendered to it to the Trustee and the Trustee will cancel all such Bonds, and also all Bonds surrendered at its office for conversion and deliver the same to the Company or upon the written order of the Company.

The Company will pay the amount of any and all United States Internal Revenue stamp taxes and any and all stock original issue or transfer stamp taxes of the State of Nevada which may be payable in respect to the issue and delivery of any stock or stock certificates, in pursuance of any of the provisions of this Section, and it will provide such stamps therefor as may be required by law. All shares of stock issued upon any conversion shall be full paid and non-assessable.

If at the time of the conversion of the principal of any Bond or Bonds into the stock of the Company, as provided in this Section, a cash adjustment is to be made between the Company and the holder of the Bond or Bonds so surrendered in respect to the accrued interest thereon and the current dividends on the shares of stock represented by the certificates delivered on such conversion, such adjustment shall be made on such basis approved by the Trustee as equitable and under such proper regulations and provisions not inconsistent herewith as the Board

Exhibit "A"—(Continued)

of Directors of the Company shall from time to time prescribe.

In case the Company and the Trustee shall be unable to agree upon a basis of adjustment which the Trustee considers equitable, then the Trustee may in its discretion fix such basis and the determination of the Trustee in that regard shall be final and conclusive upon the Company and all the holders of Bonds.

Nothing contained in this Trust Agreement, or in any of the Bonds, shall be construed to confer upon the holder of any Bond, as such, any of the rights of a stockholder in the Company before he shall have actually become such stockholder by converting the principal of such Bond into the stock of the Company, as herein provided; and no holder of any Bond, as such, shall have any right to participate in or question the issue by the Company, for cash or property, of any additional or increased capital stock of the Company of any class, or securities of the Company of any kind.

Article Fifth

Remedies in Case of Default

Section 14. In case any one or more of the following events (hereinafter called "defaults") shall happen:

(a) Default in the payment of any instalment of interest on any of the Bonds, which default shall continue for a period of thirty days;

Exhibit "A"—(Continued)

(b) Default in the performance, or a violation, of any other covenant, condition or agreement on the part of the Company in any of the Bonds or in this Agreement contained, which default shall continue for a period of thirty days after written notice thereof shall have been given to the Company by the Trustee, which may, in its discretion, give such notice, and shall do so upon the written request of the holders of 50 per cent. in aggregate principal amount of the Bonds then outstanding; or

(c) By decree of a court of competent jurisdiction, the Company shall be adjudicated a bankrupt, or by order of any such court a receiver of the property of the Company shall be appointed and such order shall have been continued in effect for a period of thirty days, or the Company shall file a voluntary petition in bankruptcy or shall make an assignment for the benefit of creditors;

then, in any such case, the Trustee, by written notice to the Company, may, and shall, upon the written request of the holders of 50 per cent. in aggregate principal amount of the Bonds then outstanding, declare the principal of all the Bonds then outstanding to be due and payable immediately; and, upon such declaration, the same shall become immediately due and payable, anything in this Agreement or in any of the Bonds contained to the contrary notwithstanding; provided, that if, at any time either before or after the principal of the Bonds shall have been so declared due and payable, and

Exhibit "A"—(Continued)

before any judgment shall have been obtained by the Trustee against the Company, all arrears of interest upon all the Bonds, with interest on overdue instalments of interest at the rate of 7 per cent. per annum, together with the reasonable charges and expenses of the Trustee, its agents, attorneys and counsel, shall have been paid by the Company and any and every other default by reason of the happening of which the principal of any of the Bonds may have been, or might be, declared due hereunder shall have been remedied and made good, then, in each such case, the holders of a majority in aggregate principal amount of the Bonds then outstanding, by written notice to the Company and to the Trustee, may waive such default and its consequences and rescind any such declaration; but no such waiver shall extend to or affect any subsequent default or impair any right consequent thereon.

Section 15. If default be made by the Company in the payment of the principal or interest of any of the Bonds, whether the same shall become due by declaration or otherwise, then, in each such case, upon demand of the Trustee, the Company agrees to pay to the Trustee for the benefit of the holders of the Bonds and interest coupons then outstanding, the whole amount then due and payable on all such outstanding Bonds and interest coupons, with interest upon overdue instalments of interest at the rate of 7 per cent. per annum, and, in addition thereto, such further amount as shall be sufficient to cover the costs and expenses of collection, including a rea-

Exhibit "A"—(Continued)

sonable compensation to the Trustee, its agents, attorneys and counsel, and any expenses or liabilities incurred by the Trustee hereunder; and in case the Company shall fail to pay the same forthwith upon demand, the Trustee, in its own name and as trustee of an express trust, shall be entitled to recover judgment against the Company for the whole amount thereof and to issue execution therefor against the whole or any part of the property of the Company, real or personal.

Any moneys collected by the Trustee under this Section 15 shall be applied by the Trustee, subject to the provisions of Section 8 hereof, as follows:

First: To the payment of the costs and expenses of collection, including a reasonable compensation to the Trustee, its agents, attorneys and counsel, and to the payment of all prior unpaid charges and expenses of the Trustee or its counsel, and all expenses and liabilities incurred or advanced, or disbursements made, by the Trustee;

Second: To the payment of the whole amount then due and unpaid either for principal or interest, or for both principal and interest, upon the Bonds, with interest on overdue instalments of interest at the rate of seven per cent. per annum; and, in case such moneys shall be insufficient to pay in full the whole amount so due and unpaid, then to the payment of such principal and interest ratably, according to the aggregate of such principal and the accrued and unpaid interest, without preference or priority of principal over interest, or of interest

Exhibit "A"—(Continued)

over principal, or of any instalment of interest over any other instalment of interest;

Third: To the payment of the remainder (if any) to the Company, its successors or assigns, or to whomsoever may be lawfully entitled to receive the same, or as a court of competent jurisdiction may direct.

Section 16. All remedies conferred by this Agreement shall be deemed cumulative and not exclusive, and shall not be so construed as to deprive the Trustee of any legal or equitable remedy by judicial proceedings appropriate to enforce the conditions, covenants and agreements of this Agreement or to enjoin the violation thereof.

No delay or omission by the Trustee, or by any holder of any Bond, to exercise any right or power arising from any default hereunder shall impair any such right or power, or shall be construed to be a waiver of any such default or an acquiescence therein; and every power and remedy given by this Agreement to the Trustee, or to the holders of the Bonds, may be exercised, from time to time, and as often as may be deemed expedient.

Section 17. In case the Trustee shall have proceeded to enforce any remedy or power under this Agreement, and such proceedings shall have been discontinued or abandoned, because of waiver, or for any other reason, or shall have been determined adversely, then, in each and every such case, the Company and the Trustee and the respective holders of the Bonds shall be severally and respectively restored to their former positions and rights here-

Exhibit "A"—(Continued)

under; and all rights, remedies and powers of the Trustee and of the respective holders of the Bonds shall continue as though no such proceedings had been taken. No waiver of any default or its consequences, under any of the provisions of this Article Fifth shall extend to or affect any subsequent default, or impair any right consequent thereon.

Section 18. Prior to January 1, 1934, no holder of any Bond issued hereunder shall have the right to institute any suit, action or proceeding, at law or in equity, for the collection of any sum due from the Company on such Bond, for principal or interest, or upon or in respect of this Agreement, or for the execution of any trust or power hereof, or for any other remedy or right under or upon this Agreement, unless such holder shall previously have given to the Trustee written notice of an existing default, and unless, also, such holder or holders shall have tendered to the Trustee security and indemnity satisfactory to it against all costs, expenses and liabilities which might be incurred in or by reason of such action, suit or proceeding, and unless, also, the holders of fifty per cent. in aggregate principal amount of the Bonds then outstanding shall have requested the Trustee in writing to take action in respect of such default and the Trustee shall have declined or failed to take such action within thirty days thereafter; it being intended that no one or more holders of Bonds shall have any right in any manner to enforce any right hereunder, or under or in respect of any of the Bonds, except in the manner herein provided,

Exhibit "A"—(Continued)

and for the equal proportionate benefit of all holders of outstanding Bonds; provided, that nothing contained in this Section 18 or elsewhere in this Agreement, or in any Bond, shall affect or impair the obligation of the Company, which is absolute and unconditional, to pay the principal of the Bonds to the respective holders thereof, at the time and place expressed in the Bonds, or to pay the redemption price thereof to the respective holders of any Bonds which may be called for redemption, on the date designated therefor, or affect or impair the right of action, which is also absolute and unconditional, of such holders to enforce and collect such payment by appropriate action, suit or proceeding.

Article Sixth

Miscellaneous Provisions

Section 19. Any demand, request or other instrument required or provided by this Agreement to be signed or executed by the holders of any Bonds may be in any number of concurrent writings of similar tenor, and may be signed or executed by such holders in person, or by attorney appointed in writing. Proof of the execution of any such demand, request or other instrument, or of the writing appointing any such attorney, and of the ownership by any person of any Bonds, shall be conclusive in favor of the Trustee and of the Company, with regard to due action taken by the Trustee or by the Company pursuant to such instrument, if such proof be made in the following manner:

Exhibit "A"—(Continued)

The fact and date of the execution by any person of any such demand, request or other instrument may be proved by the certificate of any notary public or any officer of any jurisdiction authorized by the laws thereof to take acknowledgments of deeds to be recorded in any state within the United States of America, certifying that the person signing such instrument acknowledged to him the execution thereof, or by an affidavit of a witness to such execution, duly sworn to before any such notary public or other officer.

The fact of the ownership of any Bonds which shall not at the time be registered and the amounts and serial numbers of such Bonds and the date of holding the same, may be proved by a certificate executed by any trust company, bank, banker or other depositary (wherever situated), if such certificate shall be deemed by the Trustee to be satisfactory, showing that at the date therein mentioned the person named in such certificate had on deposit with such depositary the Bonds described in such certificate; but the Trustee, in its discretion, may require such other and further proof of such ownership as, being advised by counsel, it shall deem advisable. For all purposes of this Agreement and of any proceeding pursuant hereto for the enforcement hereof or otherwise, such person shall be deemed to continue to be the owner of such Bonds until the Trustee shall have received notice in writing to the contrary. The ownership of any Bonds which shall at the time be registered shall be proved by the register thereof.

Exhibit "A"—(Continued)

Section 20. As to all Bonds which shall at the time be registered, the person in whose name the same shall be registered on the books of the Company shall for all purposes of this Agreement be deemed and regarded as the owner thereof, and payment of or on account of the principal of any such Bond so registered shall be made only to or upon the order of such registered holder. Such payment shall be valid and effectual to satisfy and discharge the liability of the Company upon such Bonds to the extent of the sum or sums so paid.

The holder of any Bond which shall not at the time be registered, and the holder of any interest coupon pertaining to any Bond, whether such Bond be registered or not, shall for all purposes of this Agreement be treated as the absolute owner of such Bond or interest coupon; and neither the Company nor the Trustee shall be affected by any notice to the contrary.

Section 21. No recourse shall be had for the payment of any part of either principal or interest of any Bond or for any claim based thereon or otherwise in any manner in respect thereof or in respect of this Agreement, to or against any incorporator, stockholder, officer or director, past, present or future, of the Company, or of any predecessor or successor company, or to or against the legal representatives or assigns of any such incorporator, stockholder, officer or director, either directly or through the Company, or any such predecessor or successor

Exhibit "A"—(Continued)

Company, whether by virtue of any statute or constitutional provision or rule of law, or by the enforcement of any assessment or penalty, or otherwise, or in any manner.

Section 22. All the covenants, stipulations and agreements in this Agreement contained by or on behalf of the Company, are and shall be for the sole and exclusive benefit of the parties hereto and of the respective holders of the Bonds and interest coupons issued hereunder. Whenever, in this Agreement, any of the parties hereto is referred to, such reference shall be deemed to include the successor or successors and assigns of such party; and all covenants, promises and agreements in this Agreement contained by or on behalf of the Company, or by or on behalf of the Trustee, shall bind and inure to the benefit of the respective successors and assigns of such party, whether so expressed or not.

Article Seventh

Concerning the Trustee

Section 23. The Trustee accepts the trusts of this Agreement and agrees to execute the same upon the terms and conditions hereof, including the following, to all of which the Company and the holders of the Bonds agree:

The Trustee shall be under no obligation to see to the performance or observance of any of the covenants or agreements on the part of the Company.

Exhibit "A"—(Continued)

The Trustee shall not be accountable in respect of the validity of this Agreement or of the Bonds; and it makes no representation in respect thereof.

The Trustee shall not be responsible for the recitals herein or in the Bonds contained, all of which are made by the Company, solely.

The Trustee shall be entitled to reasonable compensation for all services rendered hereunder, and such compensation, and that of its counsel and of such persons as it may employ in the administration of the trusts hereby created, as well as all reasonable expenses necessarily incurred and actually disbursed hereunder, the Company agrees to pay.

Until the Trustee shall have received written notice to the contrary from the holders of not less than fifty per cent. in aggregate principal amount of the Bonds at the time outstanding, the Trustee may, for all the purposes of this Agreement, assume that no default has been made in the payment of any of the Bonds or of the interest thereon, or in the observance or performance of any other of the covenants contained in the Bonds or in this Agreement, and that the Company is not in default under this Agreement.

The Trustee shall not be under any obligation to take any action hereunder, which in its opinion will be likely to involve it in expense or liability, unless one or more holders of Bonds shall, as often as required by the Trustee, furnish it security and indemnity satisfactory to it against such expense and liability; nor shall the Trustee be required to take

Exhibit "A"—(Continued)

any action in respect of any default hereunder unless requested by an instrument in writing signed by the holders of not less than fifty per cent. in aggregate principal amount of the Bonds then outstanding.

Any action taken by the Trustee at the request or with the consent of any person who at the time is the owner of any Bond shall be conclusive and binding upon all future holders of such Bond.

The Trustee shall not be answerable for the default or misconduct of any agent or attorney appointed by it in pursuance hereof, if such agent or attorney shall have been selected with reasonable care, nor for any error of judgment, nor for any act done or omitted by it in good faith, nor for any mistake of fact or of law, nor for anything whatever in connection with this Agreement, except for its own wilful misconduct.

The Trustee may advise with legal counsel, who may be counsel for the Company; and any action under this Agreement, taken or suffered in good faith by the Trustee in accordance with the opinion of counsel, shall be conclusive on the Company and on all holders of Bonds, and the Trustee shall be fully protected in respect thereto.

The Trustee shall be protected in acting upon any notice, request, waiver, consent, certificate, affidavit, indemnity bond or other instrument believed by it to be genuine and to be signed by the proper party or parties.

The Trustee, in its individual capacity, or otherwise, may acquire and hold any Bonds issued here-

Exhibit "A"—(Continued)

under with the same right and to the same extent as if it were not such Trustee.

All moneys coming into the hands of the Trustee may be treated by it, until such time as it is required to pay out the same, as a general deposit, and the interest (if any) paid thereon shall be at such rate as the Trustee allows on similar deposits.

All rights of action under this Agreement may be enforced by the Trustee without the possession of any Bonds or the production thereof on the trial or other proceedings relative thereto.

Section 24. The Trustee or any successor may resign as Trustee hereunder by filing with the Company an instrument in writing, resigning the trusts hereby created, two weeks (or such shorter time as may be accepted by the Company as adequate) before such resignation shall take effect.

Any Trustee hereunder may be removed at any time by an instrument in writing filed with the Trustee for the time being acting hereunder and executed by the holders of two-thirds in aggregate principal amount of the Bonds then outstanding; provided, there be paid to the Trustee so removed all moneys due to it hereunder.

Section 25. In case, at any time, any Trustee acting hereunder shall resign or shall be removed or otherwise shall become incapable of acting, a successor may be appointed by the holders of a majority in aggregate principal amount of the Bonds then outstanding by an instrument signed by such holders or their attorneys in fact duly authorized, and de-

Exhibit "A"—(Continued)

livered to such successor; but until a new trustee shall be so appointed hereunder, the Company may, by an instrument in writing, executed by order of its Board of Directors, appoint a Trustee to fill such vacancy. Any new Trustee so appointed by the Company shall immediately be superseded by a Trustee appointed in the manner above provided by the holders of a majority in aggregate principal amount of the outstanding Bonds.

Any Trustee appointed under any of the provisions of this Article Seventh shall always be a national banking association or other bank or trust company having an office in the City of Philadelphia, and having a capital and surplus aggregating at least One Million Dollars, if there shall be such a banking association, bank or trust company willing and able to accept the trusts upon reasonable or customary terms.

Section 26. Any successor Trustee appointed hereunder shall execute and deliver to the Company and to the retiring Trustee an instrument accepting such appointment hereunder, and thereupon such successor Trustee shall be invested with the same authority, rights, powers, duties and discretion herein provided for the Trustee; but the Trustee so resigning or removed, shall, at the request of the Company, or of the successor Trustee so appointed, and upon payment of its charges and disbursements then unpaid, make and execute such deeds, conveyances, assignments or assurances to its successor as its successor may reasonably require; and shall de-

Exhibit "A"—(Continued)

liver to such successor all cash then in its possession hereunder.

In Witness Whereof, the Company and the Trustee have caused this Agreement to be signed in their corporate names by their respective Presidents or Vice-Presidents, and their respective corporate seals to be hereto affixed, duly attested, as of the day and year first above written.

Executed in duplicate.

[Corporate Seal of Pioche Mines Consolidated, Inc.]

PIOCHE MINES CONSOLIDATED, INC.,

By Percy H. Clark, Vice-President.

Attest: H. A. McCarthy, Assistant Secretary.

[Corporate Seal of Fidelity-Philadelphia Trust Company]

FIDELITY-PHILADELPHIA TRUST COMPANY,

By N. C. Denney, Vice-President.

Attest: H. W. Woodward, Asst. Secretary.

State of Pennsylvania,
County of Philadelphia—ss.

On this 31st day of December, 1928, before me personally came Percy H. Clark, who, being by me duly sworn, said, that he resides in Cynwyd, State of Pennsylvania, that he is Vice President of Pioche Mines Consolidated, Inc., one of the corporations described in and which executed the foregoing instrument; that he knows the seal of the said Corpora-

Exhibit "A"—(Continued)

tion; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by authority of the Board of Directors of the said Corporation, and that he signed his name thereto by like authority.

[Seal] LOUISE F. McCARTHY,
Notary Public.

Commission expires at end of next session of Senate.

State of Pennsylvania,
County of Philadelphia—ss.

On this thirty-first day of December, 1928, before me personally came N. C. Denney, who, being by me duly sworn, said, that he resides in the City of Philadelphia and State of Pennsylvania; that he is a Vice President of Fidelity-Philadelphia Trust Company, one of the corporations described in and which executed the foregoing instrument; that he knows the seal of the said Corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by authority of the Board of Directors of the said Corporation, and that he signed his name thereto by like authority.

I am not a stockholder, director or officer of said Trust Company.

[Seal] G. H. ZACHERLE,
Notary Public.

Commission expires March 6, 1931.

* * * * *

EXHIBIT "D"

This Agreement, made as of the first day of October, 1930, between Pioche Mines Consolidated, Inc., a corporation organized and existing under the laws of the State of Nevada (hereinafter called the "Company"), party of the first part, and Fidelity-Philadelphia Trust Company, a corporation organized and existing under the laws of the State of Pennsylvania (hereinafter called "Trustee"), party of the second part.

Whereas, the Company has deemed it necessary to borrow money for its corporate purposes and to that end has duly determined to issue its Debenture Bonds, not exceeding the aggregate principal amount of One Million Dollars, to be designated as its "Convertible Seven Per Cent. Sinking Fund Gold Debentures" (hereinafter referred to as "Bonds"), to be dated as of October 1, 1930, to mature October 1, 1937, to bear interest from October 1, 1930, at the rate of seven per cent. (7%) per annum, payable semi-annually on April 1 and October 1 in each year, both principal and interest to be payable at the office of Fidelity-Philadelphia Trust Company in the City of Philadelphia, Pennsylvania, and all the Bonds to be signed in the name of the Company by its President or a Vice President, to be impressed with its corporate seal, attested by its Secretary or an Assistant Secretary, and to be authenticated by the certificate of the Trustee endorsed thereon, and to have interest coupons attached, executed with the facsimile signature of its Treasurer or any past or future Treasurer, and to be issued pursuant to terms

Exhibit "D"—(Continued)

and conditions set forth in this Trust Agreement, which Bonds, interest coupons and Trustee's certificate are to be substantially in the following forms, respectively:

No. (Form of Bond) $

United States of America
State of Nevada

Pioche Mines Consolidated Inc.

Convertible Seven Per Cent. Sinking Fund Gold Debenture

Pioche Mines Consolidated, Inc., a corporation of the State of Nevada (hereinafter called the "Company"), for Value Received, promises to pay to Bearer (or, if this Debenture be registered, to the registered owner hereof), the principal sum of Dollars on October 1, 1937, and to pay interest thereon from October 1, 1930, at the rate of seven per cent. per annum, semi-annually on April 1 and October 1 of each year. Any such interest falling due at or before the maturity of this Debenture shall be paid only upon presentation and surrender of the attached interest coupons as they severally mature.

Both principal and interest of this Debenture are payable at the office of the Trustee hereinafter named, in the City of Philadelphia, Pennsylvania, in gold coin of the United States of America of or equal to the standard of weight and fineness existing October 1, 1930, without deduction for any Federal income tax on or in respect to such interest, which the

Exhibit "D"—(Continued)

Company or its paying agents may be required or permitted to pay thereon or to retain or deduct therefrom under any present or future law of the United States of America, up to, but not in excess of, 2 per cent. of such interest.

This is one of an issue of Debentures of the Company, all of like date and similar tenor, except as to the denomination thereof, not exceeding the aggregate principal amount of $1,000,000., all issued pursuant to a certain Trust Agreement, dated as of October 1, 1930, executed between the Company and Fidelity-Philadelphia Trust Company, of Philadelphia, as Trustee, to which Trust Agreement reference is hereby made for the terms thereof. To the extent provided in the said Trust Agreement, all rights of action upon this Debenture prior to October 1, 1937, are vested in the Trustee.

In the manner provided in the said Trust Agreement, this Debenture may be redeemed, at the option of the Company, on any interest date, upon forty-five days' prior notice, at a redemption price equivalent to one hundred and five per cent. (105%) of the principal amount hereof and accrued interest to the date of redemption.

This Debenture shall pass by delivery until registered in the owner's name at the office of the Trustee, such registration being noted hereon. After such registration no further transfer hereof shall be valid unless made at the said office by the registered owner in person or by duly authorized attorney and similarly noted hereon; but this Debenture may be dis-

Exhibit "D"—(Continued)

charged from registry by being in like manner transferred to bearer, and thereupon transferability by delivery shall be restored. This Debenture shall continue to be subject to successive registrations and transfers to bearer, at the option of the owner, but no registration shall affect the negotiability of the attached interest coupons, which shall continue to be payable to bearer and transferable by delivery merely.

In the manner and with the effect provided in the said Trust Agreement, the principal of all the said Debentures at any time issued and outstanding may be declared, or may become, due and payable before maturity upon the happening of one or more of the events described in the said Trust Agreement.

The Debentures of this series shall be convertible at the option of the holders into the Common Stock of the Company in the manner prescribed in the said Trust Agreement, upon giving thirty days' notice as therein provided, at the rate for each One Hundred Dollars ($100.) face value of Debentures with all unmatured coupons attached, of twenty-five (25) shares of stock to and including October 1, 1934, and of twenty (20) shares of stock after said date to and including October 1, 1935, after which latter date they will not be convertible. In the event that no cash dividend shall have been declared or paid on the Common Stock within six (6) months prior to the date of conversion, the holders of the Debentures surrendered in conversion, in addition to the stock

Exhibit "D"—(Continued)

into which Debentures are convertible, shall be entitled to receive an amount in cash equal to the interest accrued and unpaid on the Debentures surrendered to the date of conversion. If a cash dividend on the Common Stock shall have been declared or paid within six (6) months prior to the date of conversion, any difference between the accrued and unpaid interest on the surrendered Debentures and the accruing dividends on the stock to be issued in conversion shall be adjusted in cash on the conversion date, such dividends to be computed at the rate per annum of the last dividend on the Common Stock paid or declared. In case this Debenture is called for redemption on a redemption date prior to the expiration of the conversion privilege, the holder hereof may still exercise his right to convert on or before the redemption date, provided he gives the required notice at least thirty (30) days prior to the date fixed for redemption.

No recourse shall be had for the payment of any part of either principal or interest of this Debenture, or for any claim based hereon, or otherwise in any manner in respect hereof or in respect of the said Trust Agreement, or of the indebtedness represented hereby, to or against any incorporator, stockholder, officer or director, past, present or future, of the Company or of any predecessor, or successor corporation, or to or against the legal representatives or assigns of any such incorporator, stockholder, officer or director, either directly or through the Company or any such predecessor or successor corpora-

Exhibit "D"—(Continued)

tion, whether by virtue of any statute or constitutional provision or rule of law, or by the enforcement of any assessment or penalty or otherwise, or in any manner; all such liability, by the acceptance hereof, and as part of the consideration for the issue hereof, being expressly released, as provided in the said Trust Agreement.

This Debenture shall not be valid or obligatory for any purpose until authenticated by the execution by the Trustee of the certificate endorsed hereon.

In Witness Whereof, the Company has caused this Debenture to be signed in its corporate name by its President or a Vice-President and impressed with its corporate seal, attested by its Secretary or an Assistant Secretary, and the attached interest coupons to be executed with the facsimile signature of its Treasurer, as of October 1, 1930.

PIOCHE MINES CONSOLIDATED, INC.,

By .....
President.

Attest:

.....
Secretary.

No. (Form of Interest Coupon) $

On the first day of , 19 , unless the Debenture herein mentioned shall have been called for redemption on or prior to such date, Pioche Mines Consolidated, Inc., will pay to Bearer at the office of Fidelity-Philadelphia Trust Company, in

Exhibit "D"—(Continued)

the City of Philadelphia and State of Pennsylvania, Dollars in United States gold coin, without deduction for any Federal income tax thereon or in respect thereto, up to, but not in excess of 2 per cent. of the said sum, being six months' interest then due on its Convertible Seven Per Cent. Sinking Fund Gold Debenture No.

.....

Treasurer

(Form of Trustee's Certificate)

This is one of the Debentures described in the within-mentioned Trust Agreement.

FIDELITY-PHILADELPHIA TRUST COMPANY, Trustee,

By .....

Vice-President.

And Whereas, all things necessary to make the Bonds, when duly authenticated by the Trustee, the valid, binding and legal obligations of the Company, and the execution and delivery of this Agreement and the issue of the Bonds, as in this Agreement provided, have been in all respects duly authorized;

Now, Therefore, This Agreement Witnesseth: That in consideration of the premises and of the purchase or acceptance of the Bonds by those who shall hold the same from time to time, and of the sum of One Dollar by each of the parties hereto to the other duly paid, the receipt whereof is hereby acknowledged, The Parties Hereto Hereby Covenant

Exhibit "D"—(Continued)

and Agree, for the equal benefit, security and protection of the legal holders of the Bonds and the interest coupons pertaining thereto, without preference of any of the Bonds or interest coupons over any of the others by reason of priority in the time of issue, sale or negotiation thereof, or otherwise for any cause whatever, except as otherwise provided in Section 8 hereof, as follows:

Article First

Designation, Form, Issue, Authentication and Registration of Bonds

Section 1. The Bonds to be issued under this Agreement shall be designated as the Company's 'Convertible Seven Per Cent. Sinking Fund Gold Debentures,' and they and the interest coupons attached thereto shall be substantially in the forms and of the tenor hereinbefore recited, respectively.

Section 2. The Company shall execute in the manner hereinbefore recited and deliver to the Trustee from time to time not to exceed One Million Dollars, aggregate principal amount, of Bonds in the denominations of $100, $500 and $1000, in such amounts as to each denomination as the Company may determine; and the Trustee shall authenticate the same and deliver the Bonds so authenticated to or upon the written order of the Company, signed by its President or a Vice-President. Except as herein otherwise expressly provided with respect to the exchange or substitution of Bonds on certain contin-

Exhibit "D"—(Continued)

gencies, no further Bonds shall at any time be issued under this Agreement.

Only such Bonds as shall be authenticated by a certificate substantially in the form hereinbefore recited, executed by the Trustee, shall be entitled to any right or benefit under this Agreement; and such authentication by the Trustee shall be conclusive evidence, and the only competent evidence, that any outstanding Bonds so authenticated has been duly issued hereunder and that the holder is entitled to the benefits hereof.

Section 3. The owner of any definitive Bond may have the ownership thereof registered at the office of the Trustee in the City of Philadelphia and State of Pennsylvania, such registration being noted on the Bond. After such registration, no further transfer of such Bond shall be valid unless made at the said office by the registered owner in person or by duly authorized attorney and similarly noted on the Bond; but the same may be discharged from registry by being in like manner transferred to bearer, and thereupon transferability by delivery shall be restored. Bonds shall continue to be subject to successive registrations and transfers to bearer, at the option of their respective owners; but no registration of any Bond shall affect the negotiability of the interest coupons pertaining thereto, which shall continue to be payable to bearer and transferable by delivery merely.

Section 4. In case any Bond issued hereunder shall be mutilated, or destroyed, the Company, in its

Exhibit "D"—(Continued)

discretion may issue, and thereupon the Trustee shall authenticate and deliver, a new Bond of like denomination, tenor and date, in exchange and substitution for and upon the cancellation of the mutilated Bond and its interest coupons, or in lieu of and in substitution for the Bond and its interest coupons so destroyed, upon receipt of evidence satisfactory to the Company and the Trustee of the destruction of such Bond and its interest coupons, and upon the receipt, also, of indemnity, satisfactory to them; provided, that the Company at its option, may require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge connected with such issue, and also a further sum, not exceeding two dollars, for each Bond so issued in substitution.

Section 5. The owner of any One Hundred Dollar ($100), and/or Five Hundred Dollar ($500) Bonds of this issue may at any time surrender the same in lots of One Thousand Dollars ($1,000) each in principal amount (accompanied, if registered, by a written instrument of transfer, duly executed) with all unmatured coupons thereto belonging, to the Trustee for cancellation and exchange and thereupon the Company shall issue and the Trustee shall authenticate and deliver to such owner a Bond or Bonds of the denomination of One Thousand Dollars ($1,000) each and representing an equivalent obligation for principal and interest. There shall always be reserved uncertified a sufficient number of One Thousand Dollar ($1,000) Bonds to represent all One

Exhibit "D"—(Continued)

Hundred Dollar ($100) and Five Hundred Dollar ($500) Bonds at any time outstanding.

Article Second

Covenants of the Company

The Company covenants with the Trustee and the holders of the Bonds as follows:

Section 6. The Company will duly and punctually pay or cause to be paid the principal and interest of all the Bonds duly issued hereunder according to the terms thereof and of this Agreement, without deduction for any Federal income tax on or in respect to such interest, which the Company or its paying agents may be required or permitted to pay thereon or to retain or deduct therefrom under any present or future law of the United States of America, up to, but not in excess of, 2 per cent. of such interest.

Section 7. So long as any of the Bonds remain outstanding and unpaid, the Company will at all times keep an agency in the City of Philadelphia and State of Pennsylvania, where notices and demands in respect of such Bonds and of this Agreement may be served, and will, from time to time, give notice to the Trustee of the location of such agency; and, in case the Company shall fail so to do, notices may be served and demands may be made at the office of the Trustee in the City of Philadelphia and State of Pennsylvania. The Company will at all times keep or cause to be kept at the said office of the Trustee books in which the ownership of any

Exhibit "D"—(Continued)

Bonds may be registered, upon the presentation thereof for such purpose, as provided in Section 3 hereof.

Section 8. So long as any of the Bonds remain outstanding and unpaid, the Company will not directly or indirectly extend or assent to the extension of the time for the payment of any interest coupon or claim for interest of or upon any Bond, and it will not directly or indirectly be a party to any arrangement therefor, either by purchasing or refunding or in any manner keeping alive such interest coupon or claim for interest, or otherwise. In case the payment of any such interest coupon or claim for interest shall be so extended by or with or without the consent of the Company, then, anything in this Agreement contained to the contrary notwithstanding, such interest coupon or claim for interest so extended shall not be entitled, in case of default hereunder, to any benefit of or from this Agreement, except after the prior payment in full of the principal of all the Bonds issued hereunder and of all such interest coupons and claims for interest as shall not have been so extended.

Section 9. So long as any of the Bonds remain outstanding and unpaid, the Company will not execute any mortgage upon, or make any pledge of, or create any lien (legal or equitable) on, any of its properties (real or personal) or on the properties of any subsidiary company, as security for any bond or bonds or funded obligations of any character, but

Exhibit "D"—(Continued)

the Company may acquire additional properties under and subject to existing mortgages.

Article Third

Redemption of Bonds

Section 10. The Company at its option may redeem the Bonds outstanding hereunder on any interest date either as a whole or in part from time to time by paying therefor the par value thereof and a premium of five per cent. (5%) and all accrued interest thereon. In case the Company shall desire so to redeem less than all the Bonds outstanding on the date on which it desires to make redemption, the Company shall notify the Trustee in writing of the aggregate principal amount of the Bonds which it desires to redeem, specifying the date (which shall not be less than sixty days after such notification) on which it desires to make redemption. As soon as practicable thereafter (and, in any event, within ten days) the Trustee shall determine, by lot, in any manner deemed by the Trustee to be fair, the particular serial numbers of the Bonds to be redeemed and shall certify to the Company the serial numbers of the Bonds so determined. The Company shall thereupon cause notice of redemption to be published in one daily newspaper of general circulation published in the City of Philadelphia, State of Pennsylvania, once a week for six successive weeks, the first publication to be not less than forty-five days prior to the date of such redemption, notice of such intended redemption, specifying the date of redemption, the serial numbers of the Bonds to be redeemed

Exhibit "D"—(Continued)

and requiring that the same be then surrendered at the office of the Trustee in the City of Philadelphia, State of Pennsylvania, for redemption at the said redemption price, and giving notice, also, that the interest on the Bonds so called for redemption shall cease on the designated redemption date. At least forty-five days prior to the redemption date, a similar notice shall also be mailed by the Trustee, postage prepaid, to the respective registered owners of any Bonds called for redemption, at their addresses appearing on the registry books. The Company, on or before the redemption date designated in such notice, shall deposit with the Trustee an amount in cash sufficient to redeem all the Bonds designated in the notice except to the extent that such bonds are to be redeemed out of Sinking Fund moneys as hereinafter provided.

In case the Company shall desire to redeem all of the Bonds outstanding on the date on which it desires to make redemption, it shall give notice thereof in like manner by publication and mailing, except that the notice need not specify the serial numbers of the Bonds to be redeemed.

Section 11. Notice of redemption having been given by publication and mailing, as provided in Section 10 hereof, the Bonds so called shall, on the date designated in such notice, become due and payable at the office of the Trustee, and, upon presentation and surrender thereof, with all interest coupons maturing on and subsequently to the redemption date, and, in the case of Bonds which shall at any time be

Exhibit "D"—(Continued)

registered, accompanied by duly executed assignments or transfer powers, such Bonds shall be paid and redeemed at the said redemption price out of the funds so deposited with the Trustee. After the date so fixed for redemption (unless the Company shall make default in providing for the payment thereof), the Bonds so called shall cease to bear further interest and thereafter said bonds shall not be entitled to any benefit of or from this agreement, but shall be entitled solely to payment out of said moneys held for their redemption by the Trustee.

Section 12. All Bonds purchased or redeemed pursuant to any of the provisions of this Article Third shall forthwith be cancelled by the Trustee and delivered to or upon the written order of the Company. All expenses of any character shall be borne and paid by the Company.

Article Fourth

Conversion of Bonds

Section 13. The bonds to be authenticated and issued under the provisions of this trust agreement shall be convertible at the option of the holders into common stock of the Company on the following basis, to-wit: For each $100. principal amount of bonds with all unmatured coupons attached—

25 shares of stock if the date of conversion is on or before October 1, 1934, and

20 shares of stock if the date of conversion is after October 1, 1934, and on or before October 1, 1935.

Exhibit "D"—(Continued)

After October 1, 1935, said bonds will not be convertible into stock. In the event that no cash dividend shall have been declared or paid on the Common Stock within six (6) months prior to the date of conversion (to be determined as hereinafter set forth), the holders of the Bonds surrendered in conversion, in addition to the stock into which said Bonds are convertible, shall be entitled to receive an amount in cash equal to the interest accrued and unpaid on the Bonds surrendered to the date of conversion. If a cash dividend on the Common Stock shall have been declared or paid within six (6) months prior to the date of conversion, any difference between the accrued and unpaid interest on the surrendered Bonds and the accruing dividends on the stock to be issued in conversion shall be adjusted in cash on the conversion date, such dividends to be computed at the rate per annum of the last dividend on the Common Stock paid or declared. In case any Bond is called for redemption on a redemption date prior to the expiration of the conversion privilege, the holder thereof may still exercise his right to convert on or before the redemption date, provided he gives written notice at least thirty (30) days prior to the date fixed for redemption, as hereinafter set forth.

Any holder of any such Bond wishing to exercise his right of conversion must, at least thirty days prior to the time when the conversion is to take place, give written notice to the Company, addressed and delivered to it either at the office of the Trustee in the City of Philadelphia, State of Pennsylvania,

Exhibit "D"—(Continued)

or at the office of the Company in the Town of Pioche, State of Nevada, setting forth the intention of the bondholder to convert his Bonds, the amount of Bonds to be converted, the serial numbers thereof, the name or names in which the Stock to be issued in exchange therefor shall be issued, and the date of conversion (which shall not be less than thirty days after the giving of such notice) and must also at the time of giving such notice surrender to the Company at one or the other of said offices the Bonds to be converted, in negotiable form, with all unmatured coupons attached thereto, and the Company will in due course deliver to the bondholder at the office where the Bonds were surrendered certificates, registered in the name indicated, for the Stock issuable in exchange for the Bonds surrendered at which time there shall be an adjustment of interest and dividends as hereinafter provided. The Company will deliver all Bonds so surrendered to it to the Trustee and the Trustee will cancel all such Bonds, and also all Bonds surrendered at its office for conversion and deliver the same to the Company or upon the written order of the Company.

In case the Company, before the expiration of the conversion privilege, shall retire its common stock of the class outstanding at the date of this indenture by issuing in exchange therefor stock of any other class (either preferred or without par value, or differing in any other particular) the right of the bondholders to convert shall continue unchanged, except that upon conversion they shall receive stock of the

Exhibit "D"—(Continued)

new class or classes in amount equivalent (according to the exchange offer) to the common stock to which they would have been entitled had no such exchange been made. In case the Company shall sell to or merge or consolidate with any other company on a basis which involves the delivery of new stock or other securities or assets of the purchasing or consolidated company in exchange for said common stock or the stock of such new class or classes issued in place thereof, the Company shall promptly publish notice of such sale or merger or consolidation in one newspaper of general circulation published in the City of Philadelphia, State of Pennsylvania, and the bondholder shall have the right for a period of ninety (90) days from and after the first publication (whether or not such period of ninety days shall extend beyond October 1, 1935, the date on which the conversion right would otherwise expire), to convert into such new stock or other securities or assets at the rate of One hundred dollars ($100.00) principal amount of bonds for such an amount of said stock or other securities or assets as, under the terms of such sale, merger or consolidation, are exchangeable to retire the number of shares of common stock to which the said bondholder would have been entitled had no new or other securities or assets been issued in place thereof. In case of any such sale, merger or consolidation, the right to convert any bond shall terminate upon the failure of the holder thereof to give the notice in this section provided for within the said period of ninety days.

Exhibit "D"—(Continued)

The Company will pay any and all United States Internal Revenue stamp taxes and any and all stock original issue or transfer stamp taxes of the State of Nevada which may be payable in respect to the issue and delivery of any stock or stock certificates, in pursuance of any of the provisions of this Section, and it will provide such stamps therefor as may be required by law. All shares of stock issued upon any conversion shall be full paid and non-assessable.

If at the time of the conversion of the principal of any Bond or Bonds into the stock of the Company, as provided in this Section, a cash adjustment is to be made between the Company and the holder of the Bond or Bonds so surrendered in respect to the accrued interest thereon and the current dividends on the shares of stock represented by the certificates delivered on such conversion, such adjustment shall be made on such basis approved by the Trustee as equitable and under such proper regulations and provisions not inconsistent herewith as the Board of Directors of the Company shall from time to time prescribe.

In case the Company and the Trustee shall be unable to agree upon a basis of adjustment which the Trustee considers equitable, then the Trustee may in its discretion fix such basis and the determination of the Trustee in that regard shall be final and conclusive upon the Company and all the holders of Bonds.

Nothing contained in this Trust Agreement, or in any of the Bonds, shall be construed to confer upon

Exhibit "D"—(Continued)

the holder of any Bond, as such, any of the rights of a stockholder in the Company before he shall have actually become such stockholder by converting such Bond into the stock of the Company, as herein provided; and no holder of any Bond, as such, shall have any right to participate in or question the issue by the Company, for cash or property, of any additional or increased capital stock of the Company of any class, or securities of the Company of any kind (unless to question a proposed issue of securities as in violation of Section 9 hereof.).

Article Fifth

Sinking Fund

Section 14. The Company will pay to the Trustee on the tenth day of each month after the mill (now under construction) goes into commercial operation, for and on account of a Sinking Fund, out of payments received during the previous calendar month for concentrates sold, One Dollar ($1.00) per ton of ore from the Company's mines, milled to produce the concentrates so sold and paid for and, in addition, one cent (1c) per kilowatt hour of power generated by the Company during such previous calendar month.

All amounts thus received for the Sinking Fund by the Trustee shall be invested by the Trustee in so many of the Bonds issued hereunder as the Trustee shall be able to purchase either with or without advertisement at a price not exceeding par, plus five per cent. (5%) premium and accrued interest, pref-

Exhibit "D"—(Continued)

erence to be given by the Trustee to the Bonds offered at the lowest price. If at any time the Trustee shall be unable to purchase Bonds for the Sinking Fund at not exceeding said price, then it shall be the duty of the Trustee, upon the written request of the Company, either

(a) To apply any moneys in the Sinking Fund to the redemption of Bonds of this issue called for redemption by the Company in the manner provided in Section 10 hereof;

After receipt of notice from the Company that it proposes to apply Sinking Fund moneys to the redemption of a designated number of Bonds, a sufficient sum shall be set aside by the Trustee out of the Sinking Fund to redeem the Bonds so called.

or

(b) To invest any moneys in the Sinking Fund in excess of Fifty Thousand Dollars ($50,000) (which amount shall be set aside for the purchase of bonds at not exceeding the redemption price as above provided) in securities recognized as legal investments for Trustees by the laws of the State of Pennsylvania.

The Sinking Fund in whatever form until used for the retirement of Bonds under this Article, shall be held by the Trustee for the benefit of the bondholders hereunder.

The uninvested portion of all Sinking Fund moneys from time to time in the hands of the Trustee shall draw interest at the current rate paid by the Trustee upon like funds held by it on deposit.

The Company covenants and agrees that it will not

Exhibit "D"—(Continued)

sell to the Sinking Fund any of the bonds issued hereunder and held in its treasury except such Bonds as may have been previously marketed and bought in by it.

If at any time the amount of cash, plus securities at their market value held in the Sinking Fund, shall be equal to or exceed one hundred and five per cent. (105%) of the face value of the Bonds at the time outstanding hereunder, the Company shall be under no obligation to make any further Sinking Fund payments as long as this condition shall continue.

Article Sixth

Remedies in Case of Default

Section 15. In case any one or more of the following events (hereinafter called "defaults") shall happen:

(a) Default in the payment of any instalment of interest on any of the Bonds, which default shall continue for a period of thirty days;

(b) Default in the performance, or a violation, of any other covenant, condition or agreement on the part of the Company in any of the bonds or in this Agreement contained, which default shall continue for a period of thirty days after written notice thereof shall have been given to the Company by the Trustee, which may, in its discretion, give such notice, and shall do so upon the written request of the holders of 50 per cent. in aggregate principal amount of the Bonds then outstanding; or

(c) By decree of a court of competent jurisdic-

Exhibit "D"—(Continued)

tion, the Company shall be adjudicated a bankrupt, or by order of any such court a receiver of the property of the Company shall be appointed and such order shall have been continued in effect for a period of thirty days, or the Company shall file a voluntary petition in bankruptcy or shall make an assignment for the benefit of creditors;

then, in any such case, the Trustee, by written notice to the Company, may, and shall, upon the written request of the holders of 50 per cent. in aggregate principal amount of the Bonds then outstanding, declare the principal of all the Bonds then outstanding to be due and payable immediately; and, upon such declaration, the same shall become immediately due and payable, anything in this Agreement or in any of the Bonds contained to the contrary notwithstanding; provided, that if, at any time, either before or after the principal of the Bonds shall have been so declared due and payable, and before any judgment shall have been obtained by the Trustee against the Company, all arrears of interest upon all the Bonds, with interest on overdue instalments of interest at the rate of 7 per cent. per annum, together with the reasonable charges and expenses of the Trustee, its agents, attorneys and counsel, shall have been paid by the Company and any and every other default by reason of the happening of which the principal of any of the Bonds may have been, or might be, declared due hereunder shall have been remedied and made good, then, in each such case, the holders of

Exhibit "D"—(Continued)

a majority in aggregate principal amount of the Bonds then outstanding, by written notice to the Company and to the Trustee, may waive such default and its consequences and rescind any such declaration; but no such waiver shall extend to or affect any subsequent default or impair any right consequent thereon.

Section 16. If default be made by the Company in the payment of the principal or interest of any of the Bonds, whether the same shall become due by declaration or otherwise, then, in each such case, upon demand of the Trustee, the Company agrees to pay to the Trustee for the benefit of the holders of the Bonds and interest coupons then outstanding, the whole amount then due and payable on all such outstanding Bonds and interest coupons, with interest upon overdue instalments of interest at the rate of 7 per cent. per annum, and, in addition thereto, such further amount as shall be sufficient to cover the costs and expenses of collection, including a reasonable compensation to the Trustee, its agents, attorneys and counsel, and any expenses or liabilities incurred by the Trustee hereunder; and in case the Company shall fail to pay the same forthwith upon demand, the Trustee, in its own name and as trustee of an express trust, shall be entitled to recover judgment against the Company for the whole amount thereof and to issue execution therefor against the whole or any part of the property of the Company, real or personal.

Any moneys collected by the Trustee under this

Exhibit "D"—(Continued)

Section 16 shall be applied by the Trustee, subject to the provisions of Section 8 hereof, as follows:

First: To the payment of the costs and expenses of collection, including a reasonable compensation to the Trustee, its agents, attorneys and counsel, and to the payment of all prior unpaid charges and expenses of the Trustee or its counsel, and all expenses and liabilities incurred or advanced, or disbursements made, by the Trustee;

Second: To the payment of the whole amount then due and unpaid either for principal or interest, or for both principal and interest, upon the Bonds, with interest on overdue instalments of interest at the rate of seven per cent. per annum; and, in case such moneys shall be insufficient to pay in full the whole amount so due and unpaid, then, to the payment of such principal and interest ratably, according to the aggregate of such principal and the accrued and unpaid interest, without preference or priority of principal over interest, or of interest over principal, or of any instalment of interest over any other instalment of interest;

Third: To the payment of the remainder (if any) to the Company, its successors or assigns, or to whomsoever may be lawfully entitled to receive the same, or as a court of competent jurisdiction may direct.

Section 17. All remedies conferred by this Agree-

Exhibit "D"—(Continued)

ment shall be deemed cumulative and not exclusive, and shall not be so construed as to deprive the Trustee of any legal or equitable remedy by judicial proceedings appropriate to enforce the conditions, covenants and agreements of this Agreement or to enjoin the violation thereof.

No delay or omission by the Trustee, or by any holder of any Bond, to exercise any right or power arising from any default hereunder shall impair any such right or power, or shall be construed to be a waiver of any such default or an acquiescence therein; and every power and remedy given by this Agreement to the Trustee, or to the holders of the Bonds may be exercised, from time to time, and as often as may be deemed expedient.

Section 18. In case the Trustee shall have proceeded to enforce any remedy or power under this Agreement, and such proceedings shall have been discontinued or abandoned, because of waiver, or for any other reason, or shall have been determined adversely, then, in each and every such case, the Company and the Trustee and the respective holders of the Bonds shall be severally and respectively restored to their former positions and rights hereunder; and all rights, remedies and powers of the Trustee and of the respective holders of the Bonds shall continue as though no such proceedings had been taken. No waiver of any default or its consequences, under any

Exhibit "D"—(Continued)

of the provisions of this Article Sixth shall extend to or affect any subsequent default, or impair any right consequent thereon.

Section 19. Prior to October 1, 1937, no holder of any Bond issued hereunder shall have the right to institute any suit, action or proceeding, at law or in equity, for the collection of any sum due from the Company on such Bond, for principal or interest, or upon or in respect of this Agreement, or for the Execution of any trust or power hereof, or for any other remedy or right under or upon this Agreement, unless such holder shall previously have given to the Trustee written notice of an existing default, and unless, also, such holder or holders shall have tendered to the Trustee security and indemnity satisfactory to it against all costs, expenses and liabilities which might be incurred in or by reason of such action, suit or proceeding, and unless, also, the holders of fifty per cent. in aggregate principal amount of the Bonds then outstanding shall have requested the Trustee in writing to take action in respect of such default and the Trustee shall have declined or failed to take such action within thirty days thereafter; it being intended that no one or more holders of Bonds shall have any right in any manner to enforce any right hereunder, or under or in respect of any of the Bonds, except in the manner herein provided, and for the equal proportionate benefit of all holders of outstanding Bonds; provided, that nothing contained in this Section 19 or elsewhere in this Agreement, or in any Bond, shall

Exhibit "D"—(Continued)

affect or impair the obligation of the Company, which is absolute and unconditional, to pay the principal of the Bonds to the respective holders thereof, at the time and place expressed in the Bonds, or to pay the redemption price thereof to the respective holders of any Bonds which may be called for redemption, on the date designated therefor, or affect or impair the right of action, of such holders to enforce and collect such payment by appropriate action, suit or proceeding.

Article Seventh

Miscellaneous Provisions

Section 20. Any demand, request or other instrument required or provided by this Agreement to be signed or executed by the holders of any Bonds may be in any number of concurrent writings of similar tenor, and may be signed or executed by such holders in person, or by attorney appointed in writing. Proof of the execution of any such demand, request or other instrument, or of the writing appointing any such attorney, and of the ownership by any person of any Bonds, shall be conclusive in favor of the Trustee and of the Company, with regard to due action taken by the Trustee or by the Company pursuant to such instrument, if such proof be made in the following manner:

The fact and date of the execution by any person of any such demand, request or other instrument may be proved by the certificate of any notary public or any officer of any jurisdiction authorized by the

Exhibit "D"—(Continued)

laws thereof to take acknowledgments of deeds to be recorded in any State within the United States of America, certifying that the person signing such instrument acknowledged to him the execution thereof, or by an affidavit of a witness to such execution, duly sworn to before any such notary public or other officer.

The fact of the ownership of any Bonds which shall not at the time be registered and the amounts and serial numbers of such Bonds and the date of holding the same, may be proved by a certificate executed by any trust company, bank, banker or other depositary (wherever situated), if such certificate shall be deemed by the Trustee to be satisfactory, showing that at the date therein mentioned the person named in such certificate had on deposit with such depositary the Bonds described in such certificate, but the Trustee, in its discretion, may require such other and further proof of such ownership as, being advised by counsel, it shall deem advisable. For all purposes of this Agreement and of any proceeding pursuant hereto for the enforcement hereof or otherwise, such person shall be deemed to continue to be the owner of such Bonds until the Trustee shall have received notice in writing to the contrary.

Section 21. As to all Bonds which shall at the time be registered, the person in whose name the same shall be registered on the books of the Company shall for all purposes of this Agreement be deemed and regarded as the owner thereof, and

Exhibit "D"—(Continued)

payment of or on account of the principal of any such Bond so registered shall be made only to or upon the order of such registered holder. Such payment shall be valid and effectual to satisfy and discharge the liability of the Company upon such Bonds to the extent of the sum or sums so paid.

The holder of any Bond which shall not at the time be registered, and the holder of any interest coupon pertaining to any Bond, whether such Bond be registered or not, shall for all purposes of this Agreement be treated as the absolute owner of such Bond or interest coupon; and neither the Company nor the Trustee shall be affected by any notice to the contrary.

Section 22. No recourse shall be had for the payment of any part of either principal or interest of any Bond or for any claim based thereon or otherwise in any manner in respect thereof or of the indebtedness represented thereby or in respect of this Agreement, to or against any incorporator, stockholder, officer or director, past, present or future, of the Company, or of any predecessor or successor corporation, (or to or against the legal representatives or assigns of any such incorporator, stockholder, officer or director,) either directly or through the Company, or any such predecessor or successor corporation, whether by virtue of any statute or constitutional provision or rule of law, or by the enforcement of any assessment or penalty, or otherwise, or in any manner.

Section 23. All the covenants, stipulations and

Exhibit "D"—(Continued)

agreements in this Agreement contained by or on behalf of the Company, are and shall be for the sole and exclusive benefit of the parties hereto and of the respective holders of the Bonds and interest coupons issued hereunder. Whenever, in this Agreement, any of the parties hereto is referred to, such reference shall be deemed to include the successor or successors and assigns of such party; and all covenants, promises and agreements in this Agreement contained by or on behalf of the Company, or by or on behalf of the Trustee, shall bind and inure to the benefit of the respective successors and assigns of such party, whether so expressed or not.

Article Eighth

Concerning the Trustee

Section 24. The Trustee accepts the trusts of this Agreement and agrees to execute the same upon the terms and conditions hereof, including the following, to all of which the Company and the holders of the Bonds agree:

The Trustee shall be under no obligation to see to the performance or observance of any of the covenants or agreements on the part of the Company.

The Trustee shall not be accountable in respect of the validity of this Agreement or of the Bonds; and it makes no representation in respect thereof.

The Trustee shall not be responsible for the re-

Exhibit "D"—(Continued)

citals herein or in the Bonds contained, all of which are made by the Company, solely.

The Trustee shall be entitled to reasonable compensation for all services rendered hereunder, and such compensation, and that of its counsel and of such persons as it may employ in the administration of the trusts hereby created, as well as all reasonable expenses necessarily incurred and actually disbursed hereunder, the Company agrees to pay.

Until the Trustee shall have received written notice to the contrary from the holders of not less than fifty per cent. in aggregate principal amount of the Bonds at the time outstanding, the Trustee may, for all the purposes of this Agreement, assume that no default has been made in the payment of any of the Bonds or of the interest thereon, or in the observance or performance of any other of the covenants contained in the Bonds or in this Agreement, and that the Company is not in default under this Agreement.

The Trustee shall not be under any obligation to take any action hereunder, which in its opinion will be likely to involve it in expense or liability, unless one or more holders of Bonds shall, as often as required by the Trustee, furnish it security and indemnity satisfactory to it against such expense and liability; nor shall the Trustee be required to take any action in respect of any default hereunder unless requested by an instrument in writing signed by the holders of not less than fifty per cent. in aggregate principal amount of the Bonds then outstanding.

Exhibit "D"—(Continued)

Any action taken by the Trustee at the request or with the consent of any person who at the time is the owner of any Bond shall be conclusive and binding upon all future holders of such Bond.

The Trustee shall not be answerable for the default or misconduct of any agent or attorney appointed by it in pursuance hereof, if such agent or attorney shall have been selected with reasonable care, nor for any error of judgment, nor for any act done or omitted by it in good faith, nor for any mistake of fact or of law, nor for anything whatever in connection with this Agreement, except for its own wilful misconduct.

The Trustee may advise with legal counsel, who may be counsel for the Company; and any action under this Agreement, taken or suffered in good faith by the Trustee in accordance with the opinion of counsel, shall be conclusive on the Company and on all holders of Bonds, and the Trustee shall be fully protected in respect thereto.

The Trustee shall be protected in acting upon any notice, request, waiver, consent, certificate, affidavit, indemnity bond or other instrument believed by it to be genuine and to be signed by the proper party or parties.

The Trustee, in its individual capacity, or otherwise, may acquire and hold any Bonds issued hereunder with the same right and to the same extent as if it were not such Trustee.

Exhibit "D"—(Continued)

All moneys coming into the hands of the Trustee may be treated by it, until such time as it is required to pay out the same, as a general deposit, and the interest (if any) paid thereon shall be at such rate as the Trustee allows on similar deposits.

All rights of action under this Agreement may be enforced by the Trustee without the possession of any Bonds or the production thereof on the trial or other proceedings relative thereto.

Section 25. The Trustee or any successor may resign as Trustee hereunder by filing with the Company an instrument in writing, resigning the trusts hereby created, two weeks (or such shorter time as may be accepted by the Company as adequate) before such resignation shall take effect.

Any Trustee hereunder may be removed at any time by an instrument in writing filed with the Trustee for the time being acting hereunder and executed by the holders of two-thirds in aggregate principal amount of the Bonds then outstanding; provided, there be paid to the Trustee so removed all moneys due to it hereunder.

Section 26. In case, at any time, any Trustee acting hereunder shall resign or shall be removed or otherwise shall become incapable of acting, a successor may be appointed by the holders of a majority in aggregate principal amount of the bonds then out-

Exhibit "D"—(Continued)

standing by an instrument signed by such holders or their attorneys in fact duly authorized, and delivered to such successor; but until a new trustee shall be so appointed hereunder, the Company may, by an instrument in writing, executed by order of its Board of Directors, appoint a Trustee to fill such vacancy. Any new Trustee so appointed by the Company shall immediately be superseded by a Trustee appointed in the manner above provided by the holders of a majority in aggregate principal amount of the outstanding Bonds.

Any Trustee appointed under any of the provisions of this Article Eighth shall always be a national banking association or other bank or trust company having an office in the City of Philadelphia, and having a capital and surplus aggregating at least One Million Dollars, if there shall be such a banking association, bank or trust company willing and able to accept the trusts upon reasonable or customary terms.

Section 27. Any successor Trustee appointed hereunder shall execute and deliver to the Company and to the retiring Trustee an instrument accepting such appointment hereunder, and thereupon such successor Trustee shall be invested with the same authority, rights, powers, duties and discretion

Exhibit "D"—(Continued)

herein provided for the Trustee; but the Trustee so resigning or removed, shall, at the request of the Company, or of the successor Trustee so appointed, and upon payment of its charges and disbursements then unpaid, make and execute such deeds, conveyances, assignments or assurances to its successor as its successor may reasonably require, and shall deliver to such successor all cash then in its possession hereunder.

In Witness Whereof, the Company and the Trustee have caused this Agreement to be signed in their corporate names by their respective presidents or Vice Presidents, and their respective corporate seals to be hereto affixed, duly attested, as of the day and year first above written.

Executed in duplicate.

[Seal of Pioche Mines
Consolidated, Inc.]

PIOCHE MINES CONSOLIDATED, INC.
PERCY H. CLARK, Vice-President.

Attest: H. A. McCARTHY, Ass't Secretary.

[Seal of Fidelity-Philadelphia
Trust Company]

FIDELITY-PHILADELPHIA TRUST COMPANY,
S. W. COUSLEY, Vice-President.

Attest: H. W. WOODWARD, Asst. Secretary.

Exhibit "D"—(Continued)

State of Pennsylvania,
County of Philadelphia—ss.

On this first day of October, 1930, before me, the undersigned authority duly commissioned and qualified, personally came Percy H. Clark, who, being by me duly sworn, said, that he resides in Cynwyd, Pa., that he is Vice-President of Pioche Mines Consolidated, Inc., one of the corporations described in and which executed the foregoing instrument; that he knows the seal of the said Corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by authority of the Board of Directors of the said Corporation, and that he signed his name thereto by like authority.

PERCY H. CLARK

Witness my hand and official seal the day and year aforesaid.

[Seal] ANDREW B. McGINNIS,
Notary Public.

Commission expires March 10, 1933.

State of Pennsylvania,
County of Philadelphia—ss.

On this first day of October, 1930, before me, the undersigned authority duly commissioned and qualified, personally came S. W. Cousley, who, being by me duly sworn, said, that he resides in Wynnewood, State of Pennsylvania; that he is a Vice-President of Fidelity-Philadelphia Trust Company, one of the corporations described in and which executed the

Exhibit "D"—(Continued)

foregoing instrument; that he knows the seal of the said Corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by authority of the Board of Directors of the said Corporation, and that he signed his name thereto by like authority.

S. W. COUSLEY

Witness my hand and official seal the day and year aforesaid.

I am not a stockholder, director or officer of said Trust Company.

[Seal] G. H. ZACHERLE,
Notary Public.

Commission expires March 6, 1931.

EXHIBIT "H"

PIOCHE DEBENTURE-HOLDERS' REQUEST DATED AS OF FEBRUARY 1, 1939.

To Fidelity-Philadelphia Trust Company, Trustee under Trust Agreement dated as of January 2, 1929, between Pioche Mines Consolidated, Inc. and Fidelity-Philadelphia Trust Company, as Trustee, providing for the issue thereunder of debenture bonds of Pioche Company not exceeding the aggregate principal amount of $500,000., to be designated as Five Year Seven Per Cent. Convertible Debentures, which mature, as extended, on October 1, 1941 (hereinafter referred to as Debentures of '29);

Exhibit "H"—(Continued)

Fidelity-Philadelphia Trust Company, Trustee under Trust Agreement dated as of October 1, 1930, between Pioche Mines Consolidated, Inc. and Fidelity-Philadelphia Trust Company, as Trustee, providing for the issue thereunder of debenture bonds of Pioche Company not exceeding the aggregate principal amount of $1,000,000., to be designated as Convertible Seven Per Cent. Sinking Fund Gold Debentures, which mature, as extended, on October 1, 1941 (hereinafter referred to as Debentures of '30).

Whereas, the coupons appertaining to the Debentures of '29 which matured on January 1 and July 1, 1938, and January 1, 1939, and the Debentures of '30, which matured on April 1 and October 1, 1938, have not been paid, the period of thirty days' grace for the payment of interest provided for in said Trust Agreements has expired as to the coupons on each of said dates, and said interest is now in default;

Now, Therefore, We, the undersigned holders of the amounts of Debentures outstanding under said Trust Agreements set opposite our names respectively, constituting altogether more than 50% in aggregate principal amount of the Debentures of each of said issues, request the Fidelity-Philadelphia Trust Company——

1. To declare the principal of all of the Debentures now outstanding under each of said Agreements to be due and payable immediately by giving written notice to the Pioche Company, as provided for in each of said Trust Agreements.

Exhibit "H"—(Continued)

2. To demand of the said Pioche Company payment to you for the benefit of the holders of the Debentures and interest coupons then outstanding, of the whole amount due and payable on all of such outstanding Debentures and interest coupons under each of said Agreements, with interest upon overdue instalments of interest at the rate of 7% per annum, and in addition thereto such further amounts as shall be sufficient to cover the costs and expenses of collection, including a reasonable compensation to the Fidelity, its agents, attorneys and counsel, and any expenses or liabilities incurred by the Fidelity under said Trust Agreements.

This written request shall not be binding until signed by the holders of 50% in aggregate principal amount of the Debentures of '29 and of the Debentures of '30.

Name of Debenture-Holder	Debentures of '29	Debentures of '30
.....	.....	.....
.....	.....	.....
.....	.....	.....

EXHIBIT "I"

NOTICE AND DEMAND

June 21, 1939

Pioche Mines Consolidated, Inc.
Pioche, Nevada.

Gentlemen:

You are hereby notified that Fidelity-Philadelphia Trust Company, Trustee under Trust Agreement dated as of January 2, 1929, between Pioche Mines

Exhibit "I"—(Continued)

Consolidated, Inc. and Fidelity-Philadelphia Trust Company, as Trustee, providing for the issue thereunder of debenture bonds of Pioche Company not exceeding the aggregate principal amount of $500,000., to be designated as Five Year Seven Per Cent. Convertible Debentures, which mature, as extended, on October 1, 1941; and

Trustee under Trust Agreement dated as of October 1, 1930, between Pioche Mines Consolidated, Inc. and Fidelity-Philadelphia Trust Company, as Trustee, providing for the issue thereunder of debenture bonds of Pioche Company not exceeding the aggregate principal amount of $1,000,000., to be designated as Convertible Seven Per Cent. Sinking Fund Gold Debentures, which mature, as extended, on October 1, 1941; because of defaults in the payment of instalments of interest on the Debentures of both of said issues, which defaults have continued for periods of over thirty days, and pursuant to the written request of the holders of more than 50% in aggregate principal amount of the Debentures now outstanding under each of said Trust Agreements, does hereby declare the principal amount of all of the Debentures now outstanding under each of said Trust Agreements to be due and payable immediately.

The undersigned has certified and delivered to Pioche Mines Consolidated, Inc., $476,300. aggregate principal amount in face value of Five Year Seven Per Cent. Convertible Debentures issued under Trust Agreement dated January 2, 1929, and $211,000. aggregate principal amount of Convertible Seven Per Cent. Sinking Fund Gold Debentures issued under

Exhibit "I"—(Continued)

Trust Agreement dated as of October 1, 1930, all of which are still outstanding and unpaid.

Interest on the Debentures dated as of January 2, 1929 was paid in cash down to and including December 31, 1930, interest on the Debentures dated as of October 1, 1930 was paid in cash down to and including March 31, 1931, and also for the six months' period ending September 30, 1937.

Coupons appertaining to the Debentures of both issues, commencing with the coupon payable January 1, 1931, down to and including the coupon due July 1, 1937, were exchanged for scrip, and thereby the maturity of the interest represented by the several coupons so exchanged was extended and, prior to this notice, was October 1, 1941, the extended date of maturity of the scrip. The Debentures of the two issues having been declared due and payable immediately by us, as Trustee, as hereinbefore set forth, the interest represented by the exchanged coupons and the scrip certificates has likewise become due and payable on the same date as the Debentures, as provided in the scrip certificates.

The coupons exchanged for scrip certificates are held as security for the scrip certificates issued in exchange, as provided in the scrip certificate, and are still outstanding and unpaid.

The undersigned, in accordance with the provisions of said two Trust Agreements, demands that Pioche Mines Consolidated, Inc. pay to it for the benefit of the holders of the Debentures and interest coupons now outstanding, the whole amount due and

Exhibit "I"—(Continued)

payable on all of such outstanding Debentures of both issues and the interest coupons appertaining thereto, with interest upon overdue instalments of interest at the rate of 7% per annum, to wit:

(a) on account of the outstanding Debentures dated as of January 2, 1929, and the coupons appertaining thereto, the sum of $476,300., with interest from January 1, 1931 to date of payment, with interest on overdue installments of interest at the rate of 7% per annum; and

(b) on account of the outstanding Debentures dated as of October 1, 1930, and the coupons appertaining thereto, the sum of $211,000., with interest from April 1, 1931 to April 1, 1937, and from October 1, 1937 to date of payment, with interest on overdue instalments of interest at the rate of 7% per annum;

and, in addition thereto, such further amounts as shall be sufficient to cover the costs and expenses of collection, including reasonable compensation to the Trustee, its agents, attorneys and counsel, and any expenses or liabilities incurred by the Trustee under said Trust Agreements.

Very truly yours,

FIDELITY-PHILADELPHIA
TRUST COMPANY,
Trustee,
By D. S. MATHERS,
Vice-President.

EXHIBIT "J"

PIOCHE DEBENTURE-HOLDERS' AGREEMENT, DATED AS OF FEB. 1, 1939

To Fidelity-Philadelphia Trust Company, Trustee under Trust Agreement dated as of January 2, 1929, between Pioche Mines Consolidated, Inc., and Fidelity-Philadelphia Trust Company, as Trustee, providing for the issue thereunder of debenture bonds of Pioche Company not exceeding the aggregate principal amount of $500,000., to be designated as Five Year Seven Per Cent. Convertible Debentures, which mature, as extended, on October 1, 1941 (hereinafter referred to as Debentures of '29);

Fidelity-Philadelphia Trust Company, Trustee under Trust Agreement dated as of October 1, 1930, between Pioche Mines Consolidated, Inc., and Fidelity-Philadelphia Trust Company, as Trustee, providing for the issue thereunder of debenture bonds of Pioche Company not exceeding the aggregate principal amount of $1,000,000., to be designated as Convertible Seven Per Cent. Sinking Fund Gold Debentures, which mature, as extended, on October 1, 1941 (hereinafter referred to as Debentures of '30).

The Fidelity-Philadelphia Trust Company is sometimes referred to in this Agreement as "Fidelity."

Pioche Mines Consolidated, Inc. (hereinafter called "Pioche Company") has paid the coupons appertaining to the Debentures issued under both of said Trust Agreements which matured down to and including April 1, 1931, and also the coupons which ma-

Exhibit "J"—(Continued)

tured on October 1, 1937, in cash, and has issued scrip in exchange for most of the coupons appertaining to said Debentures which matured from July 1, 1931 to July 1, 1937, inclusive, but a few coupons of a small aggregate principal amount which matured between said dates have not as yet been exchanged for scrip.

The coupons appertaining to the Debentures of '29 which matured on January 1 and July 1, 1938, and January 1, 1939, and to the Debentures of '30 which matured on April 1 and October 1, 1938, have not been exchanged for scrip or paid in cash, the period of thirty days' grace for the payment of interest provided for in the said Trust Agreements has expired as to the coupons payable on each of said dates, and said interest is now in default.

The scrip certificates issued in exchange for the coupons which matured from July 1, 1931 to July 1, 1937, inclusive, mature, as extended, on the same date at the Debentures, to wit, October 1, 1941, but provide (a) that in the event that either the Debentures of '29 or the Debentures of '30 shall be declared due and payable by the Fidelity under the aforesaid Trust Agreements, prior to the maturity date of the scrip, the scrip shall likewise become due and payable on the same date as the Debentures; and (b) that the coupons surrendered in exchange for scrip will be held as security for the scrip certificates issued in exchange, and that any questions arising as to the manner in which the coupons so held shall be used for the protection of the holders of the scrip issued in exchange for such coupons shall be decided by the holders of a majority in amount of such scrip.

Exhibit "J"—(Continued)

Each Debenture of '29 of the denomination of $1000, plus the interest accumulated thereon down to January 1, 1939, including scrip, overdue coupons not exchanged for scrip and interest on scrip and on such overdue coupons, amounts in round figures to $1703+.

Each Debenture of '30 of the denomination of $1000, plus the interest accumulated thereon down to January 1, 1939, including scrip, overdue coupons not exchanged for scrip and interest on scrip and on such overdue coupons, amounts in round figures to $1639+.

A written request addressed to the Fidelity-Philadelphia Trust Company, as Trustee under the aforesaid two Trust Agreements of even date herewith, and in the form, a copy of which is attached hereto, has been executed by the holders of 50 per cent of the aggregate principal amount of the Debentures of each of said issues, requesting Fidelity to declare the principal of all of the Debentures now outstanding under each of said Agreements to be due and payable immediately, and to demand of the Pioche Company payment of the whole amount due and payable on all of such outstanding Debentures and interest coupons, with interest on overdue instalments of interest and amounts necessary to cover costs and expenses of collection, as more particularly set out in said form of written request.

(A) We, the undersigned, holders of the amounts of Debentures outstanding under said Trust Agreements, set opposite our names respectively, constituting altogether more than 50 per cent in aggregate

Exhibit "J"—(Continued)

principal amount of the Debentures of each of said issues, request the Fidelity-Philadelphia Trust Company——

1. In case the Company shall fail to pay the amounts due, as above stated, forthwith upon demand, to institute such action or actions, proceeding or proceedings at law or in equity as may be advised by counsel for the protection of the debenture-holders and the collection of the sums so due and unpaid, all as provided in each of said two Trust Agreements.

Suits shall not be brought until the Committee hereinafter named shall have a reasonable time within which to negotiate an arrangement or settlement as hereinafter provided for.

2. To loan to the Committee hereinafter named such amounts as shall be called for by the Committee from time to time for the purpose of paying the expenses to be incurred in carrying out the said Trust Agreements and this Agreement, but not more than the amounts hereinafter provided for in Article F of this Agreement.

3. To do or perform any other matters or things as requested by the Committee, or a majority of the debenture-holders, within the powers hereinafter conferred upon them, and not inconsistent with the provisions of the aforesaid Trust Agreements, or either of them.

(B) The undersigned holders of Debentures agree to deposit the amounts of Debentures set opposite their names respectively, together with such scrip appertaining thereto as they respectively own or control, with Fidelity, as security for the amounts to be

Exhibit "J"—(Continued)

loaned to the Committee, as provided in Paragraph 2 above. The Debentures deposited shall have the coupons due January 1, 1938, and all subsequent coupons attached. Holders of scrip who do not own the Debentures to which such scrip appertains may also deposit their scrip hereunder and sign this Agreement. The scrip certificates deposited shall be in negotiable form. Upon the repayment of any amounts loaned by Fidelity, subject to the rights conferred upon the holders of Debentures, scrip and coupons with respect to amounts advanced by them, as provided in Article G of this Agreement, Fidelity shall continue to hold the Debentures, scrip and coupons deposited, subject to the order of the Committee.

(C) When the Debentures outstanding of each of said issues shall have been declared due and payable immediately, the undersigned debenture-holders (in their capacity as holders of a majority of the outstanding scrip and pursuant to the authority conferred on such majority by the scrip certificates as above set forth) agree to direct that all of the coupons held as security for the scrip certificates shall be delivered to Fidelity. As scrap certificates are deposited with the Fidelity, the coupons in exchange for which they were respectively issued shall be held for the protection of such deposited scrip certificates and shall be pledged with said certificates as above provided. The other coupons in exchange for which undeposited scrip certificates were issued shall be held for the protection of such undeposited scrip certificates, but shall not be surrendered or cancelled by Fidelity except in connection with the payment

Exhibit "J"—(Continued)

or settlement of the claims of the holders of all of the Debentures, scrip and coupons.

(D) Messrs. Percy H. Clark, Albert P. Gerhard, Robert F. Holden and John E. Zimmermann are hereby named a Committee (herein referred to as "Debenture-holders' Committee") for the purpose of carrying out the terms of this Agreement. The members of the Committee shall serve without compensation.

The Committee shall have the following powers:

1. To determine when to deliver the written request in the form attached hereto to Fidelity.

2. To determine the time for the performance of each one or all of the actions provided for herein, including particularly the time when suit shall be instituted, as provided for in Article A, Paragraph 1.

3. To negotiate with the Pioche Company, its creditors, stockholders and others interested, an arrangement in the nature of a reorganization or settlement for the purpose of avoiding or terminating litigation and such arrangement or settlement so negotiated shall be binding on the holders of Debentures and scrip (or overdue coupons) who shall have signed this Agreement or deposited their Debentures and scrip (or overdue coupons) hereunder, when approved by the holders of a majority of the aggregate principal amount of the outstanding Debentures.

The term "outstanding Debentures" as used in this Agreement shall include all Debentures certified by the Fidelity and delivered to the Company which

Exhibit "J"—(Continued)

shall not have been returned to the Fidelity for cancellation.

4. To determine all details relating to the carrying out of this Agreement and any arrangement or settlement negotiated as above provided or involved in the collection, by litigation or otherwise, of the sums so due and payable. In the event that judgment is secured against the Company, the Committee shall have authority to decide all matters arising in connection with the execution and satisfaction of the judgment and the sale, public or private, of the assets and properties subject thereto, including the time and place of any such sale or sales, or adjournments thereof, the amount to be bid for the assets and properties at any such sale, and other such matters.

5. To employ counsel to advise the Committee and the debenture-holders in any and all matters arising under this Agreement and the aforesaid Trust Agreements, including any arrangement or settlement or proceeding for the collection of the sums due and payable to the holders of Debentures, scrip and coupons. Said attorneys shall be entitled to reasonable compensation for all services rendered, to be provided for in any such arrangement, or settlement, or out of any amounts collected on account of the sums due and unpaid, as above, and in any event the Committee shall have authority to approve, on behalf of the holders of Debentures and scrip who have signed this Agreement or deposited hereunder, the amount of such compensation and the manner in which it shall be paid.

Exhibit "J"—(Continued)

6. To employ accountants, engineers, clerks and other assistants, as the Committee may determine, and fix their reasonable compensation, and such charges and the expenses of those so employed shall be considered as part of the Debenture-holders' Committee's expenses, and the committee may make such other expenditures as in its discretion it may deem advisable and proper in order to carry out fully and effectively the purposes of the Trust Agreements and this Debenture-holders' Agreement.

7. To borrow money from time to time from the Fidelity, or others, for the purpose of paying the expenses incurred in carrying out said Trust Agreements and this Agreement, but not in excess of the amounts hereinafter in Article F provided for. The funds so borrowed may be used by the Committee for expenses incurred by the Fidelity, the Committee, and by the attorneys and others duly authorized by the Committee, including traveling expenses, but shall not be applied to the payment of attorneys' fees, or other fees for services of any kind, except as provided in Paragraph 6 of this Article D, provided, however, that if it becomes necessary to engage a local attorney or attorneys in the district where suit is brought, the committee may pay a retainer or reasonable fees of such attorney or attorneys out of the monies so borrowed, with the approval of the Fidelity.

8. To increase the number of the Committee to five by the appointment of an additional member who

Exhibit "J"—(Continued)

shall be a debenture-holder or represent one or more debenture-holders.

9. Any further and additional powers which may reasonably assist in the accomplishment of the purposes of this instrument.

A majority of the Committee shall have power to act for the whole Committee, and any written request or direction addressed to the Fidelity, or to any other party, signed by a majority of the Committee, shall constitute action by the Committee and shall be binding on all of the members of the Committee, and if authorized by this Agreement, upon the undersigned debenture-holders.

(E) The holders of a majority in aggregate principal amount of the outstanding Debentures shall have the right at any time, by an instrument in writing executed and delivered to the Fidelity, to approve of any arrangement in the nature of a reorganization or any settlement, and to direct the termination of litigation, if litigation shall have been theretofore instituted, and to decide all matters arising in the course of carrying out this Agreement, or any such arrangement or settlement or litigation for the collection of the sums so due and unpaid, which may be considered to come outside the authority of the Committee, and any action of such a majority shall be binding on all of the holders of Debentures and scrip (or overdue coupons) who shall have signed this Agreement, or whose securities shall be deposited hereunder.

Exhibit "J"—(Continued)

(F) Amounts actually disbursed by the Fidelity and the Committee in the execution of the Trust Agreements and this Agreement shall be paid (or reimbursed) out of the funds borrowed by the Committee under the authority conferred by Article D, Paragraph 7, but no fees shall be paid out of said fund, excepting as provided in said Paragraph 7.

The power of the Committee to borrow for the purposes stated shall be subject to the following limitations:

1. The Committee shall not borrow amounts aggregating more than $5000. unless action shall be instituted under advice of counsel, as provided in Article A, Paragraph 1.

2. In the event that action shall be instituted, as provided in Article A, Paragraph 1, the Committee shall have authority to borrow up to but not exceeding the aggregate amount of $17,500.

(G) Each of the undersigned holders of Debentures within the limit set in this paragraph, hereby agrees to repay to the Fidelity on demand the amount loaned by the Fidelity to the Committee, together with interest, and each of them (within the limit stated) further agrees to indemnify the Fidelity against any expense or liability incurred by it in carrying out the terms of the said Trust Agreements and this Agreement. The liability of each debenture-holder under this Article G shall be limited to 2½% of the amount of principal, plus accumulations of interest owing to such debenture-holders respectively, as of January 1, 1939.

All monies advanced by holders of Debentures and

Exhibit "J"—(Continued)

scrip under this Article G shall be repaid in full before any distribution is made to holders of Debentures, scrip or coupons, of securities or funds recovered through litigation, or any such arrangement or settlement, and the holders of Debentures who make payments to the Fidelity under this Article G shall have a claim to the extent of the amounts paid by them respectively against the Debentures, scrip and coupons deposited, and any such funds or securities, subject only to the claims of the Fidelity.

Any one who shall advance more than his or her proper proportion of the amounts due and payable under this Article G shall have a claim for the excess against those who have not paid their full proportion, and for that purpose shall be subrogated to the claims of the Fidelity under this Article G.

(H) Any member of the Debenture-holders' Committee may resign by giving appropriate notice of his resignation in writing to the other members of the Committee. In case any vacancy in the membership of the Committee shall occur by reason of death, resignation or otherwise, such vacancy may be filled by a majority vote of the remaining members of the Committee, such choice being made from among the holders of outstanding Debentures.

(I) Neither the Debenture-holders' Committee nor any of its members shall, on account of any action of the Committee, incur any liability for the carrying out of this Agreement, or any part thereof,

Exhibit "J"—(Continued)

nor for the result of any steps taken or acts done by them respectively, for the purposes thereof, but this clause shall not be construed to relieve them, as debenture-holders signing this Agreement, from the obligations assumed by such debenture-holders. The Debenture-holders' Committee, however, undertakes in good faith to carry out the provisions of this Agreement. Neither the Debenture-holders' Committee, nor any member thereof, shall be personally liable for any act or omission of any agent or employee selected in good faith, nor for any error in judgment or mistake of law, nor in any case except for his, its or their own individual, wilful malfeasance.

(J) All monies received by the Debenture-holders' Committee may be deposited by it with any bank, bankers or trust company, to the credit of said Committee, subject to application by it for any of the purposes of this Agreement, as it may from time to time determine, and its determination as to the propriety and purposes of any such application shall be final. Any such monies shall be paid out on the written order of the Debenture-holders' Committee, acting through any agent or agents that may be appointed, by an instrument in writing signed by a majority of the Committee.

(K) The methods to be adopted in carrying out this Agreement shall be entirely discretionary with the Debenture-holders' Committee and this Agreement shall be liberally construed so as to enable the Committee to carry into effect the purposes thereof.

Exhibit "J"—(Continued)

Anything which anywhere in this Agreement the Debenture-holders' Committee is authorized to do, or allow to be done, it may do or allow to be done by or through such agent or agencies as in its discretion it may determine, or by or through others under contracts therefor with any person, firm, corporation or committee. It may supply any defect or omission, or reconcile any inconsistency in this Agreement in such manner and to such extent as it shall deem expedient to carry out the same effectively, and it shall be the sole and final judge of such expedience.

(L) This Agreement shall be construed strictly as an agreement between the parties and as solely affecting and relating to the Debenture-holders' Committee and the holders of Debentures, scrip and coupons who sign this Agreement or deposit hereunder, and the Debenture-holders' Committee and the debenture-holders who sign or deposit hereunder and no other person, firm or corporation shall have any rights whatever under this Agreement, or by reason of anything done or omitted hereunder.

(M) This Debenture-holders' Agreement shall bind and benefit the several parties, including those who deposit their securities hereunder, their and each of their heirs, executors, administrators, successors and assigns.

(N) This Agreement shall not be binding until signed by the holders of a majority of the outstanding Debentures of '29 and of the Debentures of '30.

Exhibit "J"—(Continued)

This Agreement may be executed in any number of counterparts, all of which shall constitute one and the same instrument.

Name of Debenture-Holders	Debentures of '29	Debentures of '30
.....	.....	.....
.....	.....	.....
.....	.....	.....

EXHIBIT "K"

Declaration of Trust

I, John Janney, of Pioche, Nevada, having acquired the controlling interest in the outstanding capital stock of the Nevada Volcano Mines Company, a Nevada Corporation, organized in 1908, with a total capital stock of one million shares of the par value of $1.00 per share; and having acquired options on the remainder of the Capital Stock of this Company, hereby declare myself as the holder of the title to all stock acquired, and to be acquired by me in the said Company, in trust for the benefit of myself and all of those certain hereinafter designated shareholders of the Pioche Mines Company, in proportion to their holdings in the said Pioche Mines Company, under the provisions of the following Declaration in Trust.

Whereas, the Nevada Volcano Mines Company is the owner of valuable mining properties at Pioche, Nevada, comprising eleven lode mining claims, from which leasers have in recent months produced in excess of $100,000.00 of high-grade shipping ore and

Exhibit "K"—(Continued)

have exposed to view a considerable tonnage of milling ore, and

Whereas, I have deemed it advisable to acquire the control of this property in order to prevent two rival companies from becoming active in this locality, competing with each other in the purchase of water rights, location sites, terminal facilities and other milling facilities.

Whereas, the Pioche Mines Company has no funds in its treasury with which to purchase new properties, all funds having been subscribed for the purpose of equipment and operation.

Whereas, I am able of my own resources, together with the assistance of certain members of the original Exploration Syndicate, which formed the Pioche Mines Company, to acquire control of this property without drawing on any of the funds of the Pioche Mines Company.

Whereas, I am, nevertheless, desirous of turning over this property, free of any charge or cost whatsoever, to such of the stockholders of the Pioche Mines Company as wish to share in the benefits and burdens of the operation thereof.

Whereas, I am fully alive to the fact that a corporation may be possessed of too much land and may be hurt rather than benefitted by the donation of property unless the corporation has the ability to carry the burden of the operation and development of said property, which in this case would require either an increase in the Capital Stock or else a trust such as is hereby created.

Exhibit "K"—(Continued)

Whereas, it is possible by a Declaration in Trust to convey to those shareholders who wish to share in the benefits of this property a proportionate burden in its development and thus free the corporation as a whole from any burdens incident to its development by having this burden borne proportionately and equitably by the different shareholders who participate therein, leaving all the other shareholders of the Pioche Mines Company free to hold their original stock intact, without any change whatever, either as to benefits or burdens.

Now, Therefore, this Declaration in Trust Witnesseth,

That I, John Janney, am the owner and holder and do hereby and forever hereafter hold in trust, all title, rights and interest acquired by me in the Nevada Volcano Mines Company, for the benefit of:

First: All those stockholders of the Pioche Mines Company who have acquired shares by purchase from the financing organization since the date of June 18th, 1920, which shall include all those stockholders who purchased shares from the Shareholders Committees at the price of $2.50, $3.00, $4.00 and $5.00 per share, and all those who may later acquire stock from the stockholders financing organizations at any higher price.

Second: All those stockholders of the Pioche Mines Company who have acquired shares by purchase from the financing organizations at previous date and at lower price who will deposit their shares in escrow under pooling agreement to be hereafter

Exhibit "K"—(Continued)

determined as to time and place, and who will also lend their co-operation to the Shareholders Committees at their respective localities, and assist in such reasonable ways as may be possible in the efforts of the Committees to make a success of its business of providing funds from the sale of such securities as are to be sold for the purpose of completing the equipment and carrying on the operations on the properties herein, to the point of paying dividends; and who will also contribute their pro-rata share towards the equipment and development of the said Volcano property, as follows, to-wit:

(a) Those who have purchased treasury shares at less than $1.00 per share shall return to the Syndicate Fifty Per Cent (50%) of their holdings to be resold for the purpose of providing such an operating fund; the terms and conditions as to the details of said arrangement to be mutually agreed to among the said stockholders and approved by myself.

(b) Those who have purchased shares at $1.00 per share or more, and less than $2.50 per share shall re-sell to the development fund for the same price they paid, plus interest to date, at the rate of Six Per Cent (6%) per annum, Fifty Per Cent (50%) of their holdings, same to be resold by the Committees to provide additional capital, provided such additional capital shall be needed. It being understood that the stockholders who have purchased shares at $1.00 per share or more but under $2.50 per share shall not be called upon unless such contribution is needed to avoid the Company from issu-

Exhibit "K"—(Continued)

ing bonds or increasing its Capital stock, or unless they are unable to render a personal service to offset their proper share of contribution.

(c) Those who hold shares from the original Syndicate and who are devoting their entire time to the services of their Company without compensation from said Company therefor. All other holders of Syndicate shares who have paid less than $1.00 per share shall pay sufficient additional money to make the total payment $1.00 per share, and also shall return Fifty Per Cent (50%) of said shares to provide operating funds.

Provided, However, that any stockholder of the Pioche Mines Company shall automatically forfeit all his interest in this Trust who shall do any act in flagrant violation of the interest of the Company as a whole, or attempt to advance his personal or selfish interests in such a way as to obstruct or oppose the general good of the Company in its lawful, legitimate progress towards the point of successful operations of its ores and the payment of dividends.

Provided, Further, that it is in no way obligatory on any stockholder to comply with the provisions of this Trust unless he wishes to bring himself within the benefits of its provisions and every stockholder within the Pioche Mines Company has a full right and option of refusing to in any way participate in this Trust and he will in no way be deprived of any benefits or property belonging to him as a stockholder in said Company, as fully set forth and provided in the Articles of Incorporation thereof.

Exhibit "K"—(Continued)

Provided, Also, that all stockholders wishing to accept the provisions of this trust shall give notice in writing of their intention so to do within twenty-four months from this date, addressed to me, John Janney, at Pioche, Nevada. Within twelve months thereafter a trust certificate will be duly issued to each shareholder who has qualified under the provisions of this Trust and who therefore has shown himself to be entitled to receive same. (Time extended at request of annual stockholders meeting of January, 1925, subject to slight modification of clause "b".)

In Testimony Whereof, I hereunto subscribe my signature and seal. Done at Pioche, in the State of Nevada, this 15th day of July 1920.

[Seal] /s/ JOHN JANNEY

Witness: /s/ W. W. GRUBBS

(Copy)

AMENDED VOLCANO MINES COMPANY DECLARATION IN TRUST

Whereas, certain stockholders of the Pioche Mines Company have not availed themselves of the privileges granted them under that certain Declaration in Trust, dated the 15th day of July, 1920, and

Whereas, at the annual meeting of stockholders held in Pioche, Nevada, on January 22nd, 1925, a Special Committee was appointed for the purpose of securing from the Exploration Syndicate a renewal of the offer to stockholders enabling them to par-

Exhibit "K"—(Continued)

ticipate in the Nevada Volcano Mines Company, which right expired by limitation of time on the 15th day of July, 1922.

Now, Therefore, I, John Janney of Pioche, Nevada, having acquired the outstanding issued stock of the Nevada Volcano Mines Company (less about 2%), do hereby declare myself as the holder of the title to all stock acquired by me in said Company in Trust for the benefit of myself and all of those certain hereinafter designated stockholders in the Pioche Mines Company in proportion to their holdings in the said Pioche Mines Company, share for share, who shall pool their shares as required in former Declaration in Trust, and who shall conform to the provisions and requirements hereinafter set forth, namely:

(a) Shareholders who purchased at $1.00 per share may have for twenty-four months from this date the privilege of surrendering to the Exploration Syndicate Thirty (30) Percent of their holdings.

(b) Shareholders who purchased at $1.50 per share may likewise have the privilege of surrendering Twenty (20) Percent of their holdings.

(c) Shareholders who purchased shares at less than $1.00 per share may likewise have the privilege of surrendering Fifty (50) Percent of their holdings.

(d) All those shareholders who have qualified under provisions of previous Declaration in Trust, dated July 15th, 1920.

Shares so surrendered to be in payment for the

Exhibit "K"—(Continued)

same relative interest in the Nevada Volcano Mines Company as the remaining shares held by them shall represent in the Pioche Mines Company, which is to say that their relative interest shall be the same in each Company.

Shares so surrendered to the Exploration Syndicate to be used by them as they shall deem expedient and proper to defray expenses and discharge the obligations of the said Exploration Syndicate in their work for and in their advances to the Pioche Mines Company.

Provided, However, that any stockholder of the Pioche Mines Company shall automatically forfeit all his interest in this Trust who shall do any act in flagrant violation of the interests of the Company as a whole, or attempt to advance his personal or selfish interests in such a way as to obstruct or oppose the general good of the Company in its lawful, legitimate progress towards the point of the successful operations of its ore and the payment of dividends.

Provided, Further, that it is in no way obligatory on any stockholder to comply with the provisions of this Trust unless he wishes to bring himself within the benefits of its provisions, and every stockholder within the Pioche Mines Company has a full right and option of refusing to in any way participate in this Trust, and he will in no way be deprived of any benefits or property belonging to him as a stockholder in said Company, as fully set forth and provided in the Articles of Incorporation thereof.

Exhibit "K"—(Continued)

Provided, Also, that all stockholders who wish to accept the provisions of this Trust shall give notice in writing of their intention so to do within twenty-four months from this date, addressed to me, John Janney, at Pioche, Nevada. Within twelve months thereafter a trust certificate will be duly issued to each shareholder who has qualified under the provisions of this Trust, and who, therefore, has shown himself to be entitled to receive same.

In Testimony Whereof, I hereunto subscribe my signature and seal.

Done at Pioche, in the State of Nevada, this 24th day of February, 1925.

[Seal] .....

Witness:

.....

[Endorsed]: Filed January 29, 1940.

[Title of District Court and Cause.]

DEFENDANTS' AMENDED ANSWER

* * * John Janney is a stockholder of Pioche Consolidated; admit that John Janney held offices in Pioche Consolidated and in Pioche Mines Company, and in Nevada Volcano Mines Company, and was a member of the Exploration Syndicate, as alleged in said paragraph; allege that John Janney and the group of stockholders known as the Exploration Syndicate are a non-profit group associated together

for the purpose of protecting the interests of all stockholders of the Pioche companies; allege that defendant John Janney has served in the aforesaid capacities without salary or any other compensation and has personally defrayed his own expenses in the furtherance of the Companies' business; deny that defendant John Janney controls the boards of directors of Pioche Consolidated and its two subsidiaries above named and allege that his sole powers are those which are provided by law for his position as stockholder, director and officer of the companies;

* * * the Exploration Syndicate originally acquired an option on a certain group of claims known as the Bingham Group, which is now a part of the West End Group of claims, and allege that at the time of the building in of the railroad to Pioche, said Exploration Syndicate conveyed to Pioche Mines Company this option subject to the payment of $14,000 remaining due under the said option and allege that immediately thereafter the Pioche Mines Company acquired a quitclaim deed from Bingham and his associates to properties known as the Bingham Group of claims upon making to the owners an additional part payment, and that subsequently full title was acquired by letters patent from the Government of the United States under Mineral Survey No. 4160; admit that the Exploration Syndicate acquired other mining rights which are now included in the group known as the West End Group of claims, and later, the Wide Awake Mine and a controlling interest in the stock of the Nevada Volcano Mines

Company and allege that the West End Group of claims was conveyed to Pioche Mines Company without further compensation, that the rights acquired in the Wide Awake Mine were conveyed to Pioche Mines Company for One Dollar consideration, and that the stock interest in the Nevada Volcano Mines Company was placed in trust for the stockholders of Pioche Mines Company under the provisions of a trust agreement known as the Volcano Trust, a copy of which is annexed as Exhibit "K" to the complaint; admit that the Exploration Syndicate acquired the properties known as the Poorman Mine, Nevada-Des Moines group, the Toledo-Pioche group of mining claims, the lease of the Early Day Mines from Amalgamated Pioche Mines and Smelters Corporation and the Aerial Tramway connecting the mines with the mill, together with a 49% interest in the mill, and allege that all of these properties were conveyed to Pioche Mines Consolidated by the Exploration Syndicate in consideration of stock in the Consolidated Company, and allege that the stock payment received for Toledo-Pioche group of mining claims was afterwards placed in trust for the benefit of the Pioche Mines Consolidated; admit that the Gold Crown group of claims was acquired by the Exploration Syndicate, and allege that this property was subsequently conveyed to Pioche Mines Consolidated in consideration of the offer made to the stockholders of the Pioche Mines Company for the exchange of their shares on a share for share basis for shares of Pioche Mines Consolidated; admit that a controlling beneficial interest in the capital stock

of Nevada Volcano Mines Company was acquired by the Exploration Syndicate, and allege that title to this stock interest was acquired by John Janney on behalf of said Exploration Syndicate and allege that said stock was subsequently placed in trust for the benefit of the stockholders of the Pioche Mines Company pursuant to a declaration of trust recorded in the minutes of Pioche Mines Company, and allege that a copy of said declaration of trust was sent to the heads of the organized shareholders' groups in each locality where shareholders' groups were organized, and that subsequently a printed copy of said declaration of trust was mailed to all of the stockholders of defendant Pioche Mines Company;

* * * in December, 1928 a consolidation plan was agreed upon by parties representing the Mines Company, the Exploration Syndicate and others, and allege that these others were Percy H. Clark, John E. Zimmermann and R. T. Naylor; admit that this consolidation agreement provided for (a) the incorporation of a new company to be called Pioche Mines Consolidated, Inc. with an authorized capital stock of 2,500,000 shares of the par value of $5 each; (b) the issue of 1,000,000 shares of said stock for the purchase of the properties and claims of the Exploration Syndicate but deny that these properties included any claim of the Syndicate for $380,826.94 or for any sum of money against the Mines Company, and allege that said alleged claim for $380,826.94 was extinguished at the time of the consolidation; (c) the setting aside of 1,000,000 shares of stock to be offered to Pioche Mines Company stockholders in ex-

change for their stock and the attendant interest in the Nevada Volcano Mines Company which accrued under the Volcano trust, and allege that the exchange was to be subject to arrangements authorized by the Board of Directors of the Pioche Mines Company and subject to the approval by the Board of Directors of Pioche Mines Consolidated and allege that such arrangements provided for the pooling of all shares of those stockholders of the Pioche Mines Company who had purchased shares at a price lower than $4 per share provided that upon payment of a third dividend upon the stock of Pioche Mines Consolidated, the shares of Pioche Mines Consolidated were then to be delivered to Pioche Mines Company stockholders; (d) the balance of the authorized capital stock amounting to 500,000 shares was to be held for conversion in debentures and for future financing and allege that for the purpose of carrying out this plan of consolidation it was agreed by and between the above named parties that the Board of Directors of Pioche Mines Company should recommend to the stockholders of Pioche Mines Company the exchange of shares contemplated in the plan of consolidation and it was agreed by the aforesaid Percy H. Clark and John E. Zimmermann that they would cooperate and work with the Company in the event that it should encounter unexpected difficulties in the conduct of its affairs, and it was agreed that said Percy H. Clark would act as counsel of the said Company and that he would cooperate with the management in the legal and financial departments of the Company's business and it was agreed that the afore-

said John E. Zimmermann would serve as a member of the Board of Directors of the new Consolidated Company and perform the duties and obligations incident thereto.

Admit that in accordance with the consolidation agreement Pioche Mines Consolidated was duly incorporated and allege that the action described in the first two sentences of the second paragraph of paragraph numbered VI of the complaint and also the membership of the Board of Directors were known and agreed to by the parties to the consolidation agreement; admit that the holders of 85% of the outstanding shares of stock of Pioche Mines Company surrendered their stock in exchange for stock of Pioche Mines Consolidated and allege that said stock was surrendered and endorsed in favor of Pioche Mines Consolidated and that an equal number of shares of Pioche Mines Consolidated were issued in their name and place in a pool and that pool certificates were thereupon issued to said stockholders pursuant to an agreement set forth upon the face of said pool certificates, and allege that this exchange was accomplished pursuant to the recommendation of the officers of Pioche Mines Company made in reliance upon the agreement of Percy H. Clark and John E. Zimmermann as previously set forth in this paragraph; admit that debentures of 1929 to the amount of $419,600 were sold pursuant to the consolidation agreement and were paid for in cash at par but deny that the proceeds were sufficient to develop the mines and purchase the necessary equipment therefor.

* * * Deny that defendant Janney controls and

has at all times since the incorporation of Pioche Consolidated controlled the Board of Directors of Pioche Mines Company and allege that the only powers exercised by John Janney in respect to said Company and its Board of Directors are the powers which he exercises as provided by law for a stockholder, director and officer of such Company; deny that Messrs. Milner and Ferry had invested no funds in the Pioche enterprise and allege that as members of the Exploration Syndicate they were interested in the distribution of shares paid for property sold to the Company by the said Exploration Syndicate and allege furthermore that said Milner and Ferry were elected members of the Boards of Directors of Pioche Mines Company and of Pioche Mines Consolidated because they had invested heavily of their time and because of the value of their experience and knowledge of mining affairs which they had acquired as directors and managers of leading mining companies; allege further that Messrs. Milner and Ferry received no salaries for their services from the Company nor did they receive their expenses in the conduct of the Company's affairs and that they gave a very considerable amount of time to the Company's affairs making extended visits to the mines, examinations of the properties and attending meetings throughout the country for the transaction of Company business; admit the other allegations except as herein denied contained in the first paragraph of said paragraph numbered VII of the complaint.

Deny that at any time the defendant Janney has had absolute control over the corporate organiza-

tion affairs and properties of Pioche Mines Consolidated, Inc. or of its two subsidiaries Pioche Mines Company and Nevada Volcano Mines Company and deny that the boards of directors of any of said companies have perpetuated themselves by filling vacancies from time to time by the election of parties under the control of defendant Janney and allege that the only powers exercised by defendant Janney or by said boards of directors are such as are provided by law for boards of directors of corporations and for the stockholders and officers thereof; admit that no formal meeting of the stockholders of Pioche Mines Consolidated or of Pioche Mines Company since the incorporation of Pioche Mines Consolidated has ever been called or held but allege that no request or demand for such stockholders' meeting has ever been advanced by any stockholder in either Company, that no request or formal demand was ever made by Percy H. Clark at any time during the long period of years in which he acted as counsel for the Consolidated Company that such stockholders' meeting be called and defendants respectfully refer to the further explanation thereof which appears in paragraph 12-k of this amended answer; allege furthermore that frequent and informal meetings have been held of the principal stockholders, and contact has been maintained with the heads of the various local stockholders' organizations; admit that defendant Janney holds under the Volcano trust shares of stock in the Nevada Volcano Mines Company and allege that defendant Janney acquired this stock at his own expense and placed the same in trust for

the benefit of stockholders of Pioche Mines Company and has since held said stock in trust under the provisions of said declaration of trust known as the Volcano Trust and that said stock of Nevada Volcano Mines Company has been kept in a safe deposit vault in the Utah Savings & Trust Company, Salt Lake City, Utah, in an envelope designating it to be held in escrow for Pioche Mines Company together with a copy of the declaration of trust under which such shares are held;

* * * the mining and milling operations of Pioche Consolidated were brought to an abrupt close in September, 1929 when the mill was partly destroyed by fire, but deny that the other activities of the company ceased and allege that the plans for reconstruction and refinancing were immediately undertaken and actively pursued, and that the mill building was reconstructed, that mining and milling operations were later resumed; allege that any inability to adequately finance the Pioche Consolidated enterprise resulted from the refusal of Percy H. Clark and John E. Zimmermann to carry out their undertakings made at the time of the consolidation agreement, and from their interference as more particularly set forth in the affirmative defenses herein; admit that in 1933 the Daly East Gold Vein located on the Toledo-Pioche group of claims was opened and the shipments of ores from this development were made.

Admit that efforts were made from time to time to raise funds first by the sale of convertible Debentures of '30, and later by borrowing on open book account and on notes and by sales of stock; admit that the mill building was reconstructed after the sale of the

Debentures of '30; and admit that it has never been equipped to operate on a commercial basis and allege that this was because of the average grades of ore then available and further allege that other grades of ore which would have permitted such profitable operation would have been available if the development program had not been interfered with; admit that a number of small subscriptions to the capital stock have been received and that Pioche Consolidated has borrowed very substantial sums from time to time, and allege that information as to the exact amounts borrowed has been available to plaintiffs; deny that funds acquired by the Pioche Enterprise were absorbed by the maintenance of an organization in Pioche and allege that such funds have been used for the purpose of carrying on the necessary business and maintaining the properties of the Pioche enterprises including the acquisition of additional equipment and the improvement of the Pioche properties; deny that Pioche Consolidated has been financed by the "method of hand to mouth financing" except when such financing was forced upon the Company by the activities of said Clark and his associates, as more fully alleged in the affirmative defense herein; deny that the operations of the Pioche enterprise have been conducted at any excessive loss but admit that the return from the experimental work heretofore conducted has, as is usual in such cases, been less than the cost thereof, and allege that the conduct of the Consolidated enterprise at a loss to date is the direct result of the actions of said Clark and his associates, as more fully set forth in the affirmative defenses herein, which said activi-

ties have prevented the adequate financing of Pioche Consolidated and consequently have prevented the operation of Pioche Consolidated on a large enough tonnage basis to enable that Company to operate at a profit; deny that Pioche Consolidated is insolvent and allege that any suspension of business of said Pioche Consolidated for want of funds to carry on the same is entirely the result of the acts and conduct of said Clark and his associates as is more fully alleged in the affirmative defenses herein;

* * * Pioche Consolidated addressed a letter to the debenture holders asking them to sign a Reorganization Agreement, and admit that the contents of said letter and the terms and inducements offered under said Reorganization Agreement are as set forth in the copies of said letter, Reorganization Agreement and Plan of Reorganization enclosed therewith (annexed hereto as Exhibit A), and defendants particularly deny the characterizations in the complaint that the debenture holders were required to make any sacrifice or concession or that any terms or provisions of said Plan of Reorganization were not fully disclosed therein, and allege that all terms of said Agreement and Plan were arrived at by mutual agreement between representatives of the parties in interest and that said debenture holders demanded and obtained adequate consideration in return for all their so-called concessions; deny knowledge or information sufficient to form a belief as to the allegation that some of the debenture holders were unwilling to sign the Reorganization Agreement; admit that the Agreement was not signed by the holders of the

requisite number of debentures to make it binding according to its terms and that the plan never became operative, and allege that the failure to obtain a sufficient number of signatures to make the Plan of Reorganization and Agreement thereunder operative was entirely due to the refusal and failure of said Clark and Zimmermann to fulfill an agreement entered into by them to use their best efforts to obtain signatures to the plan; allege furthermore that said Clark and Zimmermann did not use their best efforts to secure signatures as agreed but on the contrary worked to defeat the plan and discourage the new money.

* * * there were discussions in April and May, 1939 relative to the avoidance of litigation and the recapitalization of the Company and allege that negotiations looking toward this end were postponed pending an audit and examination of legal titles requested by the said Committee of Debenture Holders, and that after receipt of said audit and examination no further negotiation as contemplated under the aforesaid agreement of February 1, 1939 was arranged by said Clark and his associates; admit that defendant John Janney agreed to an audit of accounts and for an examination of legal titles as alleged and that defendant John Janney went to Pioche on or about June 23, 1939; and allege that said audit, so far as these defendants are concerned, was made as quickly as was possible under the then existing circumstances; deny that the reports disclosed gross mismanagement and waste and deny that John Janney failed to make a full disclosure of material facts as requested by the Debenture Holders' Committee

and failed to cooperate with them in other respects.
* * * * *

Defendants allege that Percy H. Clark proposed the said consolidation and he then and there agreed that if the consolidation was made in accordance and the bond issue which he proposed was authorized and sold to himself and his clients, that he would become responsible for the legal matters connected with the Company's affairs and that the details connected with or arising out of the consolidation proposed would rest entirely upon his shoulders, that he would assume entire responsibility therefor and leave the time and energy of the management of the Pioche Mine Consolidated to be devoted to engineering and operating problems; and that Percy H. Clark has since used his position as attorney for the Company to obstruct the Company's progress, to interfere with its plans and to set traps for its officials, in relation to legal matters involved in the Company's affairs, for the purpose of obstructing the defendant Consolidated Company.

* * * defendant Consolidated Company has never been advised by its attorney, Percy H. Clark, to issue the certificates of 850,000 shares, representing the ownership of the Pioche Mines Consolidated in the stock of the Pioche Mines Company but, on the contrary, he has advised that a double transfer tax will be required to be paid upon the said certificates and has never furnished defendant Consolidated Company satisfactory evidence of the soundness of this legal opinion which has been questioned by the defendant Consolidated Company, based on contrary

advice received from other sources; allege that shareholders of the Pioche Mines Company who had previously purchased shares for less than $4.00 per share received pool receipts, their stock certificates being held in pool until the third dividend shall have been paid by Pioche Mines Consolidated, in accordance with resolution of the Board of Directors; allege that the failure of John E. Zimmermann to serve as Director, as agreed, and the actions of Percy H. Clark heretofore set forth in this answer, which have thwarted the Company's financing plan and have obstructed its progress toward profits and dividends, have made payment of said three dividends so remote as to constitute the basis for the said Pioche Mines Company stockholders calling for the return of their shares, because of the violations of agreements and because of the fraud following from interferences aforesaid, and allege that such right, of the Pioche Mines Company stockholders, has existed ever since the said Percy H. Clark and John E. Zimmermann, having obstructed the Company financing, failed and refused to carry through the plan of January 24, 1938, as agreed and particularly since the said Percy H. Clark has declared a default on the bonds and instituted action against the said Company, in violation of his agreements and obligations and to the great damage of stockholders of said Pioche Mines Company.

* * * John Janney alleges that the Volcano Trust could not legally be dissolved by unilateral action on the part of the trustee, that he was improperly advised by Percy H. Clark as counsel for the Pioche

Consolidated at the time of the first meeting of the incorporators of said company to sign a paper agreeing to dissolve said Volcano Trust, that he signed said paper but that said paper did not legally dissolve said trust for the reason that the beneficiaries of the Trust did not give their consent thereto; defendants herein allege that never before the initiation of this action did Percy H. Clark, as representative of Debenture Holders or as attorney for the plaintiffs or at all, ever bring to the attention of the defendants or Pioche Mines Consolidated or its board of directors that such a dissolution of the Volcano Trust was legal or could be made.

Defendants deny that the provision in the Volcano Trust for trust certificates to be issued, had application to subsequent shareholders but it specifically applied to the then present stockholders and to those who answered the circular letter and gave notice, "in writing, of their intention" to accept the provision of the trust and who therefore "within twelve months therefrom" were to receive a Trust certificate, and that all such stockholders did receive certificates.

Defendants allege that this applied to those who answered the circular letter of February 25, 1925, and that all who later became stockholders of Pioche Mines Company automatically participated in the Trust under the terms thereof. It was never intended or agreed that they could receive any other certificate than the Certificate of Stock in the Pioche Mines Company which automatically shared in the benefits of the Trust.

* * * title to the mill site was never in the Pioche Mines Consolidated or Pioche Mines Company, and that Percy H. Clark, now attorney for Debenture Holders, was so advised and that copies of all deeds conveying any and all property to the Pioche Mines Consolidated, at the time said Company was formed, were handed over to Percy H. Clark, attorney for plaintiffs, who was then attorney for the Pioche Mines Consolidated; allege that before forming the Consolidated Company, to wit, on January 28, 1923, defendant John Janney, on behalf of Exploration Syndicate, acquired from Consolidated Nevada-Utah Corporation a lease on said mill site. Said lease extended to July 1, 1942, and was recorded with the County Recorder of Lincoln County, Nevada, in Book J Miscellaneous, Page 176, on July 17, 1923, and called for a rental payment of $300 per year; allege said mill site lease was then placed in trust, which trust is set forth in Pioche Mines Company minutes and carries 51% interest in said mill site lease to Pioche Mines Company and 49% to the Exploration Syndicate. Copy of said mill site trust dated July 14, 1919 is annexed hereto and marked Defendant's Exhibit B; allege that the forming of the Pioche Mines Consolidated, the Exploration Syndicate having expanded $197,514.11 on said mill, conveyed by Quitclaim Deed all of "grantees right, title and interest in Lease on Yuba Mill Site and Mill, and other improvements located thereon", to the Pioche Mines Consolidated for 39,000 shares of its capital stock at par value which was $5.00 per share and allege that a copy of this deed was furnished to

Percy H. Clark; allege that said Quitclaim Deed conveying 49% interest of Exploration Syndicate in Lease on Mill Site to Pioche Mines Consolidated was duly recorded in Recorder's Office of Lincoln County, Nevada, in Book K Miscellaneous, Page 25, on December 29, 1928; that the Pioche Mines Company 51% interest in said trust was retained by Pioche Mines Company when Consolidated Company was formed, and still is retained; allege that after the fire at the mill the value of the Pioche Mines Company's interest in the machinery and equipment was appraised and sold to Pioche Mines Consolidated at its appraised value of $80,531.40, but the record does not show that the Pioche Mines Company sold or conveyed its 51% interest held by it under the Trust, in the mill site lease; allege that a fee of $25,000 in stock was paid to Percy H. Clark's law firm, in full for legal services rendered down to September 1, 1930, which included services in examining titles and approving title transfers made in connection with the consolidation and the defendant Consolidated Company holds receipt for said payment which was made by John Janney from his personal shares in said Company to save the Company paying the $25,000; allege that Percy H. Clark, as attorney for the said Pioche Mines Consolidated, had agreed to make examination of titles to all Company property, as a part of services rendered, and said Percy H. Clark was given, at his request, a copy of all deeds conveying property to the Pioche Mines Consolidated as above stated, and abstract of titles to the property conveyed to Consolidated Company were furnished

by County Recorders office; further allege that after the meeting with Percy H. Clark, John E. Zimmermann and R. T. Naylor in October, 1928, when the pre-consolidation agreement was arrived at and after the Consolidated Company was formed, in December 1928, and after the bond issue was subscribed by said Percy H. Clark, John E. Zimmermann and associates, defendant John Janney deemed that it would be to the advantage of all friendly interests in the said Company for the underlying fee title to the mill site to be held in friendly hands, rather than left in the hands of the Consolidated Nevada-Utah Corporation, who were the lessors, and on March 7, 1929 defendant John Janney acquired the lessors' rights in said property at his own expense and holds the said lessor's rights, intending same to be for the benefit of all stockholders, and has never charged any rents or obtained any personal profit therefrom; deny that the defendant John Janney holds title to any of the property or property rights which went into the Pioche Mines Consolidated at the time the said Pioche Mines Consolidated was organized, or which said Pioche Mines Consolidated has acquired by purchase or otherwise since its incorporation.

Defendants deny that disbursements have been made or any assessment work done on any properties with Consolidated Company funds except for the protection of Company rights and admit that, for the purpose of economy, the same force of men have done the work on Company and non-Company properties but they were not paid for with Company funds, except when done on Company properties and except

in cases where funds had been advanced and charges were made against these advances, and allege that this was a plan which reduced overhead and worked for the mutual advantage of all parties concerned and was in no way an added expense to defendant Consolidated Company.

* * * by deed dated August 8, 1939, Mines Company conveyed lots 14, 15, 16, and 17, Block 1, of Lots and Blocks Delineated on the official map of Town of Pioche, with the office building thereon erected, and allege said office building was the property of John Janney prior to June 15, 1922, on which date he conveyed said building to the Pioche Mines Company in consideration of the sum of $1.00, intending it to be used by said Company and for the benefit of its stockholders; allege that Pioche Mines Company, on July 26, 1939, sold said lots and building back to John Janney for the same consideration of $1.00 and for the additional consideration of loans of money and the obtaining of loans of money, to wit: the cash sums aggregating $91,150, most of which has been reloaned to Pioche Mines Consolidated, and other sums; allege that said transaction was for the protection of defendant Companies' creditors and stockholders and not for the purpose of injuring the creditors and stockholders as alleged; allege that as a result of said transaction defendant Companies were able to borrow the necessary funds to finance the current needs of the Company and save the credit of both Pioche Mines Company and Pioche Mines Consolidated, and that the Board of Directors of the Pioche Mines Company exercised their best judg-

ment in providing for the Company's requirements by said transaction.

Allege that the only other property transaction of Pioche Mines Consolidated has to do with an option on certain designated unpatented mining claims, which option was granted on June 2, 1930, by defendant John Janney to defendant Consolidated Company for a period of two years and afterwards extended from time to time on condition that the Pioche Mines Consolidated should perform the annual assessment work on the said claims, that the Pioche Mines Consolidated was unable to perform the assessment work for the year 1938 on said claims because of the aforesaid interference of its debenture holders with its financing, and that upon demand made to defendant Consolidated Company to perform the assessment work or else give up the option on the claims, said Consolidated Company asked that John Janney perform assessment work upon said claims and extend the option for a period of four months; that at the request of the auditor of the Debenture Holders' Committee, this option was again extended and meantime the claims have been conveyed to S. W. Ford, Trustee, who has provided for the assessment work on said claims at the expense of defendant John Janney, that the option is still in effect if the Pioche Mines Consolidated wishes to exercise it and on the same terms as originally granted; further allege that no money was ever spent upon the said claims for assessment work by the Pioche Mines Consolidated, because of the fact that the said claims were contiguous to other grounds under op-

eration of said Pioche Mines Consolidated so that the expenditures of money for assessment work by said Consolidated Company could be, and was, performed upon its own property adjoining the claims held under option.

* * * the so-called claim for $380,826.94 was a bookkeeping entry reflecting a certain loan of stock to Pioche Mines Company, and allege that Pioche Mines Company was never under any obligation to repay said loan in cash, but only to repay said loan in stock, and this obligation was discharged and extinguished by the issuance of stock in connection with the Consolidation in 1928.

* * * at the request of the Debenture-Holders' Committee, a Mr. Lieb of Barrow, Wade, Guthrie & Co., public accountants, was sent to Pioche in October 1939; allege that Mr. Lieb was unable or unwilling to spend the necessary time to complete such audit; allege that the officers and employees of the defendant Consolidated Company gave to Mr. Lieb, the auditor for the Debenture Holders' Committee, every cooperation and extended him every courtesy, that the records of the Company necessary for a complete audit were made available to him, and the defendant, John Janney, President of the Company, freely and fully answered all requests for explanation by said auditor and asked if his explanation was satisfactory, receiving an affirmative reply.

Defendants deny that the accounts of the Pioche Consolidated were audited by Mr. Lieb the accountant, but on the contrary allege that Mr. Lieb did not remain in Pioche long enough to make a complete

audit, and in spite of the urgent requests of defendants he refused to do so; further allege that Mr. Lieb, representing the firm of Barrow, Wade, Guthrie & Co., was acting in collusion with Percy H. Clark and associated bondholders, that the report purporting to be the result of an audit of the books and records of the Consolidated Company is not the result of a proper audit of said books and records, but was the result of collusion between the auditor and Percy H. Clark, and said report of auditor is intended to reflect information which said auditor received not from the Company records, but from Percy H. Clark and the Debenture Holders' Committee, and information so secured is incorrect, misleading and untrue.

* * * substantial loans have been made from John Janney to the Company, which have tided the Company over emergencies during the periods of interference with its financing; that said advances were never withdrawn except at the convenience of the Company, and despite difficulties created by opposition and interference, John Janney, through his credit and that of associated stockholders, have furnished to the Company all funds which up to this date have been required to pay said defendant Companies' necessary obligations, and maintain its property and its organization and preserve the interest of its stockholders, and at no time was the balance shifted so that defendant John Janney was ever indebted to the Company; allege that these loans were made in the period when the sale of Company shares was stopped by interference with its financing plans and also after default was declared and attachment

levied, by Percy H. Clark and his associated debenture holders; allege that during all this period defendant John Janney advanced money on Company notes without taking undue advantage of the Company's need for money in an emergency.

* * * the entire staff of defendant Consolidated Company has spent much of their time and especially the President John Janney, in recent years in catering to the whims and caprices of Percy H. Clark and associated debenture holders giving and checking estimates and answering repeated requests for Balance Sheets, and then later Balance Sheets, and other information, which was for the purpose of distraction of the management from constructive work and in opposition to Company financing.

* * * on frequent occasions Percy H. Clark, the attorney for the Company, has been asked if he considered it desirable for a stockholders' meeting to be held, and in no single instance did he ever reply in the affirmative; allege that under the pre-incorporation agreement previously referred to, it was agreed among other things who the Directors of the Consolidated Company should be, and that said agreement has been fully carried out as to such Directors; allege that the present Board of Directors with their associated groups of stockholders represented the controlling stock interest in the Company and no change in the Directors could be had without their vote, and that they never expressed any desire for change in the Board of Directors.

* * * defendant Mines Company has conveyed the office building to defendant John Janney as hereto-

fore explained, and allege that the disbursement of the $100,522.50 allegedly advanced to Pioche Mines Company was in accord with arrangements with Pioche Mines Company and Exploration Syndicate and in accord with pre-incorporation agreements and with the approval of said Percy H. Clark, the attorney for the Company and now attorney for the Plaintiffs, and the same were properly reported to the stockholders of both Pioche Mines Company and Pioche Consolidated; allege further that the details as to notes in the amount of $114,750.89, issued during 1939 and the manner in which it has disposed of said funds were disclosed as to this item in Resolution of Board of Defendant Pioche Mines Company, which resolution was specifically shown to the auditor of Debenture Holders' Committee in 1939.

* * * * *

For a First Complete Defense to the Allegations Based on Breach of Contract to Pay Interest, Script and Principal Due on Debentures, This Defendant Pioche Mines Consolidated Alleges on Information and Belief:

18. The complaint herein alleges that it was filed pursuant to the request of a Debenture Holders' Committee, and was furthermore based upon the written request of the holders of more than fifty per cent. in aggregate principal amount of the outstanding debentures of each issue. Said Debenture Holders' Committee, as is alleged in the complaint, is composed of Percy H. Clark, Chairman, Albert P. Gerhardt and Robert F. Holden. On information and belief that Committee, so composed, actively so-

licited the debenture holders for the purpose of obtaining and representing a sufficient number of debenture holders to demand that the Fidelity-Philadelphia Trust Company should institute and carry on this action. Said Clark, certain of his family and business associates, and other persons under his control, owned a sufficient number of said outstanding debentures of each of said issues referred to in the complaint so that if the bonds so held by said Clark and said persons under his control were eliminated, then the Fidelity-Philadelphia Trust Company would not be in the possession of a written request from more than fifty per cent in aggregate principal amount of the outstanding debentures of each of the debenture issues and this suit could not properly be instituted by said Trust Company, as Trustee, under the debenture trust agreements. Said Clark and said other debenture holders under his control, or who have cooperated and connived with him, may not in this suit enforce the terms of the said debentures owned by each of them by reason of their acts and conduct hereinafter set forth; nor may they accomplish an enforcement of said debentures by requesting their trustee, the plaintiff Fidelity-Philadelphia Trust Company, to institute this suit for the enforcement of said debentures on behalf of and for the benefit of said Clark and his said associates, for their said request is null and void; and accordingly this suit may not be maintained by Fidelity-Philadelphia Trust Company, as trustee, under the debenture agreements, for the benefit of said debenture holders including said Clark and his said associates.

Furthermore, by reason of the acts and conduct

of said Clark and his said associates, hereinafter set forth, payment of the scrip, interest and principal of said debentures may not be enforced in this action.

19. Said Clark was counsel for this defendant from the date of its incorporation until January 26, 1939, on which date he resigned, and said Clark was also Vice-President of this defendant from about January 7, 1929 to about February, 1940; the duties of said Clark as Vice-President concerned principally the financing of this defendant. As such Vice-President and counsel, said Clark occupied a relation of trust to this defendant and owed to it a duty of unswerving faithfulness and loyalty and a duty to work only for its best interests.

20. Disregarding the aforesaid obligation and in violation of his fiduciary duty, said Clark pursued during the years in which he was such officer and counsel a policy intentionally calculated to undermine the credit of defendant Pioche Mines Consolidated, Inc., and to prevent this defendant from properly equipping and developing its properties by threats and coercion and by interfering with and thwarting all plans to provide the necessary financial support for this defendant. The purpose and effect of said Clark's disloyal and obstructionist conduct and activities have been to reduce the value of this defendant's properties and stock, thus preventing additional financing, and to precipitate a situation in which this defendant's assets may be required to be sold at a fraction of their real value to satisfy the judgments sought by the trustee for the debenture holders, and such properties upon such sale will be

bought in for and on account of said Clark and others associated with him. The said Clark has evidenced from an early date an intent and purpose to seize control of the properties of said company in derogation of the rights and interests of said Company, its other stockholders and creditors other than the debenture holders represented by said Clark.

21. Among the wrongful, unlawful and disloyal acts and conduct of said Clark and his associates are the following acts:

(a) In 1928 upon the strong advice, suggestion and recommendation of said Clark and his associates, this Company issued the first series of debentures for the enforcement of which this action is brought. Said debentures were issued only upon the express promise and agreement made by said Clark and his associates to cooperate and furnish capital for the financing necessary to develop, equip and operate the properties of this defendant. After the issue of said debentures said Clark and his associates wholly failed to perform the promise and agreement on their part made relative to the financing of this defendant.

(b) Said Clark at his own request and suggestion became Counsel for the Company upon the express promise that he or his firm would care for and properly handle all of the legal problems of this defendant. Said Clark has failed to carry out his obligations in this respect to this defendant.

(c) Said Clark took unfair advantage of his position as Counsel to this defendant to render opinions designed to block and delay the adequate financing of this defendant.

(d) Said Clark improperly in violation of his

duties as Counsel and Vice President of this defendant and in violation of his agreement to cooperate in the financing of this defendant, took positions and did certain acts relative to the registration of this defendant's stock with the Securities and Exchange Commission which effectively prevented and delayed the sale of this defendant's stock and the financing of this defendant.

(e) Said Clark at various times has taken steps to block the sale of this defendant's stock by communicating with prospective purchasers in such a manner as to cast doubt upon defendant's title to mining properties and otherwise to interfere and hamper such sales.

(f) Said Clark suggested plans for financing this defendant, which plans were suggested for the sole purpose of delaying and preventing the financing of this defendant in the manner theretofore determined upon by the management of this defendant.

(g) Said Clark has in various ways and at various times prevented the filing of a prospectus necessary before stock of this defendant could be sold, and threatened that unless he were retained as attorney in connection with filing the second prospectus he would organize the debenture holders in opposition to the proposed sale of securities.

(h) In connection with the reorganization agreement of January 24, 1938, Percy H. Clark, John E. Zimmermann and Albert P. Gerhardt agreed to use their best efforts to obtain signatures of debenture holders up to the percentage required to make the reorganization plan operative. The above named in-

dividuals were appointed a committee of the debenture holders for the purpose of carrying out the terms of the reorganization agreement and the reorganization plan. In violation of this agreement, nevertheless, said Clark and those associated with him, after obtaining the signatures of 75% in interest of such debenture holders, took no further steps to obtain the balance of signatures required, and said Percy H. Clark in particular threatened to withhold his signature and other signatures unless he received a legal fee and a general release of liability for his previous acts and transactions and those of his firm in connection with the defendant Companies including his acts of obstruction and interference as related in this Answer. Upon the denial of these and other unjustifiable demands said Clark and those associated with him began raising numerous false and unfounded objections to the reorganization plan and preventing the signature of such agreement by making false and unfounded statements as to this defendant and its management. Said Clark with the cooperation and connivance of his associates, furthermore violated his duty as an officer and counsel of this defendant and as a member of the debenture holders committee by refusing to disclose upon request of the President of this defendant the names of the debenture holders who had not signed the reorganization agreement. By his activities and failure to cooperate he prevented the reorganization plan from taking effect and engaged in a course of action intentionally calculated to prevent this defendant from obtaining the necessary financing, although

adequate financing under the reorganization plan could have been obtained but for the actions and conduct of said Clark and his associates.

22. By his said course of action said Clark, with the cooperation and connivance of his associates, intentionally precipitated the present situation in which the company has been unable to pay the interest due on its debenture issues. He has thereby rendered impossible the performance by this defendant of the obligations which are sought to be enforced in this action.

23. After causing his company to default in the aforesaid manner said Clark assumed the leadership as chairman of a debenture holders committee composed of John E. Zimmermann, Albert P. Gerhardt, Robert F. Holden and himself, which functioned for the purpose of enforcing the obligation of this defendant, the performance of which by said company had been rendered impossible through the said Clark's opposition and disloyal activities, with the cooperation and connivance of his associates including other members of said committee.

24. The said Albert P. Gerhardt and John E. Zimmermann collaborated with the said Clark while he was officer and counsel of the Company and subsequently thereto. They were fully cognizant of the purpose and effect of his course of action, notwithstanding which knowledge they continued to collaborate and associate with Clark as members of the Debenture-Holders' Committee formed for the purpose of enforcing payment of the principal and interest due on the Company's debenture issues.

For a Second Complete Defense to the Allegations Based on Breach of Contract to Pay Interest, Scrip and Principal Due on Debentures, These Defendants Allege on Information and Belief:

* * * * *

26. Said acts by said Clark and his said associates were done pursuant to a conspiracy entered into by said Clark, his said associates, and other persons, the names of whom are not now known to these defendants, for the purpose of taking from these defendants its valuable mining and ore properties for the benefit of said Clark, his said associates and other parties, the identity of whom is not now known to defendants. The properties of the defendant companies are of very great value, far in excess of any sums due on said debentures by way of principal and interest, and said great value of said properties has been for some time well known to said Clark and to his said associates.

27. The formation of a Debenture-Holders' Committee by said Clark, his activity, and the activity of the said Committee in the solicitation of debenture holders, the request for the institution of this suit, and the institution thereof, are all part of the scheme and conspiracy heretofore referred to on the part of said Clark and his said associates, known and unknown, to take over for their own use and benefit the valuable properties of these defendants to the exclusion of these defendants and their other creditors and security holders.

For a Third Complete Defense and Counterclaim to the Allegations Based on Breach of Contract to Pay Interest, Scrip and Principal Due on Debentures, Defendants Allege on Information and Belief:

* * * * *

29. By reason of said acts and conduct by said Clark and his said associates, who are all holders of debentures and who are represented by Fidelity-Philadelphia Trust Company, as Trustee, in this suit, defendant Pioche Mines Consolidated has suffered damages in excess of Five Million Dollars ($5,000,-000), which said sum constitutes a defense, counterclaim and set-off against the demands in this suit made by said Fidelity-Philadelphia Trust Company, as Trustee.

For a Fourth Complete Defense and Counterclaim to the Allegations Based on Breach of Contract to Pay Interest, Scrip and Principal Due on Debentures, Defendants Allege on Information and Belief:

* * * * *

31. By reason of said acts and conduct by said Clark and his said associates, who are all holders of debentures and who are represented by Fidelity-Philadelphia Trust Company, as Trustee, in this suit, defendant Pioche Mines Consolidated has suffered damages in excess of Five Million Dollars ($5,000,000), which said sum constitutes a defense, counterclaim and set-off against the demands in this suit made by said Fidelity-Philadelphia Trust Company, as Trustee.

For a Fifth Defense and Counterclaim Against E. Clarence Miller and Edward C. Dale, Defendants Allege on Information and Belief:

* * * * *

33. Defendants allege that said plaintiffs, E. Clarence Miller and Edward C. Dale, in collaboration and in collusion with said Percy H. Clark, Albert P. Gerhard and Robert F. Holden, and others unknown to defendants, instituted and commenced this action against defendants and filed and caused to be filed the complaint on file herein, and said plaintiffs well knew and were fully cognizant of the contents thereof and the purport and effect of this action and said complaint. Said plaintiffs well knew that such complaint contained statements that were false and defamatory which statements were calculated to do great damage to defendant Consolidated Company, its officers, its directors and its management, but said plaintiffs nevertheless neglected to secure from defendant Consolidated Company or otherwise the true facts relating thereto. Said false and defamatory statements were known to be untrue, and were made in collaboration with Percy H. Clark, Albert P. Gerhard and Robert F. Holden and plaintiff, Fidelity Trust Company. Said statements are contained in the complaint on file herein and, among others, are as follows:

1. Page 22—Line 4-7. "John Janney and his dummy Board of Directors have never rendered any account to stockholders and debenture-holders showing the amounts received, the total present indebted-

ness and now these large sums have been expended."

2. Page 22—Line 20-24. "Although Pioche Consolidated in 1929 advanced $100,522.50 to Mines Company, and during 1939 it issued its notes to the amount of $114,750.89 to John Janney and others, no account has ever been rendered by Mines Company of the manner in which it has disposed of the funds so acquired."

3. Page 17—Line 16-22. "John Janney failed to perform in full the obligations undertaken by him at the time of the adoption of the consolidation plan and other wrongful acts of commission and omission in connection with the operation of the combined enterprise have occurred since the incorporation of Pioche Consolidated, some of which involve grave breaches of trust and for which John Janney has been responsible * * *."

4. Page 17—Line 6-9. "The reports disclose gross mismanagement and waste and John Janney has again failed to make a full disclosure of material facts as requested by the Committee and has failed to cooperate with them in other respects."

5. Page 3—Line 23-25. "* * * John Janney absolutely controls Pioche Consolidated and Mines Company, their directors, properties and affairs, and has himself been responsible for the wrongful acts of which Stockholders complain * * *."

6. Page 20—Line 16-20. "The above-mentioned failure of the said John Janney as President of Pioche Consolidated and his dummy Board of Di-

rectors to maintain and not subordinate the above-mentioned claim of $380,826.94 against Mines Company constitutes wilful and wrongful mismanagement of said Pioche Consolidated."

That aforesaid John Janney was and is President of defendant Pioche Consolidated Company.

That said plaintiffs in collaboration and collusion with said Percy H. Clark, Albert P. Gerhard and Robert F. Holden and plaintiff, Fidelity Trust Company and others unknown to defendants, caused copies of said complaint with accompanying papers to be circulated and distributed among debenture holders and other persons. That the filing of said complaint and the circulation thereof with accompanying papers, as aforesaid, with the aforesaid statements therein, was intended to depreciate and destroy the values in the defendant Consolidated Company.

* * * * *

February 17, 1941.

/s/ DOUGLAS A. BUSEY,
Attorney for Defendant, Pioche Mines Company.

/s/ CLARENCE M. HAWKINS,
Attorney for Defendant, Pioche Mines Consolidated and Defendant John Janney.

Duly Verified.

[Endorsed]: Filed February 17, 1941.

[Title of District Court and Cause.]

ANSWER OF FIDELITY-PHILADELPHIA TRUST COMPANY AND E. CLARENCE MILLER AND EDWARD C. DALE TO COUNTERCLAIMS OF PIOCHE MINES CONSOLIDATED, INC.

A

Fidelity-Philadelphia Trust Company (hereinafter sometimes referred to as "Fidelity") answers the counterclaims made by Pioche Mines Consolidated, Inc. (hereinafter sometimes referred to as "Company") in Paragraphs 28 and 29 and 30 and 31 of Defendants' Amended Answer, as follows:

28.

Fidelity alleges that the allegations of Paragraph 28 of Defendants' Amended Answer, including the allegations of Paragraphs 18 to 24, inclusive, realleged in Paragraph 28, are immaterial, impertinent and irrelevant and fail to state a claim upon which relief can be granted.

Although Fidelity believes the allegations of said Paragraphs are immaterial, impertinent and irrelevant and fail to state a claim upon which relief can be granted, nevertheless, it admits, denies and alleges in regard to the statements contained in the Paragraphs above referred to as follows:

18. Fidelity admits that a written request was delivered to it in the form attached to the Complaint as Exhibit "H", duly executed by the holders of more than 50% in aggregate principal amount of the outstanding debentures of each of the two issues, and

that Complaint herein was filed pursuant to the request of the Debenture-holders' Committee.

Fidelity alleges that it is Trustee named in the two Trust Agreements (Exhibit "A" and "D" to the Complaint in this cause) under which the two issues of debentures of Pioche Consolidated were issued, as more particularly set forth in the Complaint; that said Agreements both provide (a) that in case of default in the payment of any installment of interest on any of the bonds, which default shall continue for a period of thirty days, the Trustee, by written notice to the Company, may and shall, upon the written request of the holders of 50% in aggregate principal amount of the bonds then outstanding, declare the principal of all of the bonds then outstanding to be due and payable immediately; and (b) that upon such declaration the same shall become immediately due and payable; and (c) that in case of such default, if the Company fails to pay the amount due forthwith upon demand, the Trustee shall be empowered to institute such action or proceedings at law or in equity, as may be advised by counsel, for the protection of the bondholders and the collection of the sums due and unpaid; that Pioche Consolidated has defaulted in the payment of interest on both series of debentures; that Fidelity duly declared the principal of all of said bonds due and payable immediately and made formal demand for payment and upon failure of the Company to pay the amounts due on demand, Fidelity instituted this suit in its capacity as Trustee under said Trust Agreements; that it derives all necessary authority to bring this

suit from said Trust Agreements and although the holders of more than 50% in aggregate principal amount of the outstanding debentures of each issue requested it to declare the bonds immediately due and payable, and the Debenture-holders' Committee requested it to bring suit, its authority to do so was in no way dependent on said written requests. Fidelity denies that the written requests of Clark and others are null and void and avers that in view of said requests and the deposit with it of a very large majority of the outstanding debentures, coupons and scrip, as set forth in the Complaint, it was necessary for it to institute this suit by reason of the obligations imposed upon it as Trustee under the said Trust Agreements.

Fidelity admits that Debenture-holders' Committee is composed of Percy H. Clark, Chairman, Albert P. Gerhard and Robert F. Holden, and on information and belief, that some of the members of said Committee solicited certain debenture-holders to sign the written request (Exhibit "H" to the Complaint) and the Debenture-holders' Agreement (Exhibit "J" to the Complaint) and that Percy H. Clark is the beneficial owner of $60,000. of debentures of 1929 and $55,000. of debentures of 1930 held in the name of Willoughby Company, which signed said written request and Debenture-holders' Agreement, but denies that such bonds, or any other bonds, the holders of which have signed the request and Agreement, can be eliminated as suggested, and on information and belief denies that members of Clark's family and his business associates and other persons who

signed said request and Debenture-holders' Agreement did so under the control of said Clark.

Fidelity denies that it could not properly institute this suit and collect the amounts due, as more particularly set forth in the Complaint. Fidelity, on information and belief, denies each and every other allegation of Paragraph 18.

19. Fidelity, on information and belief, admits that said Clark acted as counsel for Company and served as Vice-President for the periods and under the conditions hereinafter stated, and as such Vice-President and counsel occupied a relation of trust to the Company and owed to it a duty of unswerving faithfulness and loyalty, and a duty to work only for its best interests. Fidelity is informed, believes and therefore avers that in October, 1927 an arrangement was entered into between Clark and Janney, by which Clark was to act as Eastern counsel for Pioche Mines Company; that in October, 1928, when it was tentatively agreed to consolidate the ownership and control of properties owned by Pioche Mines Company and the Exploration Syndicate into a new Company to be known as Pioche Mines Consolidated, Inc., Janney engaged Clark to do the legal work involved in carrying into effect the consolidation as so agreed upon; that after said Company had been incorporated and the consolidation had been authorized, to wit, on or about December 26, 1928, Clark was elected a Vice-President of the Company, with very limited authority; that commencing on or about January, 1936, Janney became unwilling to see Clark or discuss the affairs of the Company with him, except

when absolutely necessary, and Clark received little or no information concerning the Company and performed only such duties as were necessary in connection with the debentures, scrip, coupons, etc., which had been theretofore within his particular charge; that Janney gave no explanation of his change of attitude and Clark continued to hold the positions of counsel and Vice-President until he was forced to resign both of said offices on or about the 15th day of January, 1937, by reason of unfounded charges made by Janney; that on February 5, 1937, upon the written request of Janney, he withdrew his resignation in order that he might be named as counsel in the extended Prospectus dated December 26, 1936; that said resignation was withdrawn under an arrangement which provided, among other things, that Clark's firm would continue to act as counsel only in such matters as should be entrusted to its charge; that Janney violated the terms of the arrangement in every essential particular; that Clark's firm, by letter to John Janney dated January 26, 1939, finally terminated any connection it might have with the Company as its legal representative, stating it seemed desirable to do so as the firm wished to be free to advise a group of debenture-holders who had been considering how they could best reorganize to protect their investment, and on February 3, 1940 Clark wrote Janney resigning as Vice-President of the Company, to take effect immediately.

20. Fidelity, on information and belief, denies the allegations and each of them contained in Paragraph 20.

21. Fidelity is without knowledge or information sufficient to form a belief as to who are the parties referred to at sundry places in Paragraph 21 of the Answer as "and his associates" following the name Clark.

21(a). Fidelity is informed, believes and therefore avers that in 1928 Clark suggested a plan of consolidation intended to meet the requirements of the financial situation with which Pioche Mines Company and Exploration Syndicate were confronted at the time, and this plan involved the consolidation of the ownership or control of all of the properties into a new company and the issue by said company of convertible debentures of the general character of those issued under the two Trust Agreements above referred to; that this plan was discussed by Messrs. Janney, Zimmermann, Naylor, Milner, Ferry, Grubbs and Clark, and after having been modified to meet the views of all the above named parties, was unanimously approved, adopted and put into operation. Fidelity denies, on information and belief, that said debentures were issued only upon the express promise and agreement of Clark, as averred, and that Clark wholly failed to perform any promise or agreement on his part relating to the financing of defendant but, on information and belief avers that Clark did agree that if the plan was carried out substantially as agreed upon he would subscribe for some of the debentures when offered, and would cooperate with the management to make the plan a success; that he did subscribe and pay for $60,000. of the debentures of 1929 and he cooperated with Janney and

his Companies for a number of years until Janney made it impossible for him longer to do so.

21(b). Fidelity, on information and belief, admits that at his own suggestion Clark became Eastern counsel for Pioche Mines Company in October, 1927, and later represented Pioche Consolidated in many matters, but denies on information and belief each and every other allegation of Paragraph 21(b).

21(c). Fidelity, on information and belief, denies each and every allegation of Paragraph 21(c).

21(d). Fidelity, on information and belief, denies each and every allegation of Paragraph 21(d).

21(e). Fidelity, on information and belief, denies each and every allegation of Paragraph 21(e).

21(f). Fidelity, on information and belief, denies each and every allegation of Paragraph 21(f).

21(g). Fidelity, on information and belief, denies each and every allegation of Paragraph 21(g).

21(h). Fidelity, on information and belief, admits that Percy H. Clark, John E. Zimmermann and Albert P. Gerhard were appointed a Committee of debenture-holders by the Reorganization Agreement (which never became operative) for the purpose of carrying out the terms of the Reorganization Agreement and the Reorganization Plan; that Percy H. Clark and Albert P. Gerhard agreed to use their best efforts to obtain signatures of debenture-holders up to the percentage required to make the reorganization plan operative, and that they succeeded in obtaining the signatures of approximately 75% in amount of such debenture-holders; that it was understood that John E. Zimmermann could not take an

active part in obtaining signatures as he planned to go to South America for an extended absence, and that he did go prior to the issuance of the plan and did not return to Philadelphia until late in March, 1938. Fidelity is without knowledge or information sufficient to form a belief as to the truth of the averment that "adequate financing under the reorganization plan could have been obtained." Fidelity, on information and belief, denies each and every other allegation of Paragraph 21(h).

22. Fidelity, on information and belief, denies each and every allegation of Paragraph 22.

23. Fidelity admits that Clark was chosen as Chairman of the Debenture-holders' Committee now composed of Albert P. Gerhard, Robert F. Holden and himself, and that Clark accepted said office and, upon information and belief, avers that John E. Zimmermann resigned as a member of said Committee before having attended any meeting; that said Committee functioned for the purpose of performing the duties imposed upon it by the Debenture-holders' Agreement (Exhibit "J" to the Complaint) including, among other duties, that of enforcing the just obligations of defendant in case that shall prove necessary, but on information and belief denies each and every other allegation of Paragraph 23.

24. Fidelity, on information and belief, admits that Albert P. Gerhard, commencing about December 26, 1937, and John E. Zimmermann, commencing October, 1928, collaborated with Clark while he was an officer and counsel of the Company, and subsequent thereto at certain times and from time to time,

concerning particular matters relating to the affairs of the Company but, on information and belief, denies that this collaboration, or any thereof, was for any improper purpose or effect, and is informed, believes and therefore avers that this collaboration, down to November, 1939, was for the benefit and assistance of Pioche Consolidated, and subsequent thereto for the protection of the investors in the Pioche enterprise.

29.

Fidelity is without knowledge or information sufficient to form a belief as to who are the parties referred to as Clark's "said associates" but admits that as Trustee under the said Trust Agreements it represents in this suit the holders of all outstanding debentures of both issues, and avers that attached hereto as Exhibit "A" is a statement listing the names of the debenture-holders, with amounts of debentures owned by each, in three classses, to wit: (1) those who have deposited their debentures with Fidelity and to whom non-negotiable receipts have been issued; (2) those who have not deposited their debentures but whose ownership of debentures to the amounts stated on March 29, 1941 has been verified; and (3) those who were at one time holders or owners of debentures, the present ownership of which Fidelity has not verified. Fidelity, on information and belief, denies each and every other allegation of said Paragraph 29.

30.

Fidelity alleges that the allegations of Paragraph 30 of Defendants' Amended Answer, including the

allegations of Paragraphs 18 to 27, inclusive, realleged in Paragraph 30, are immaterial, impertinent and irrelevant and fail to state a claim upon which relief can be granted.

Although Fidelity believes the allegations of said Paragraphs are immaterial, impertinent and irrelevant and fail to state a claim upon which relief can be granted, nevertheless, it admits, denies and alleges in regard to the statements contained in the Paragraphs above referred to as follows:

18 to 24, inclusive. Fidelity admits, denies and alleges in regard to the statements contained in Paragraphs 18 to 24, inclusive, as hereinbefore set forth under Paragraph 28.

26. Fidelity denies, on information and belief, that Clark ever entered into a conspiracy with any person or persons whatsoever for any purpose whatsoever.

Except as stated in Paragraph XIII of the Complaint in this action, Fidelity is without knowledge or information sufficient to form a belief as to the truth of the averments that the properties of defendant Companies are of very great value, far in excess of any sums due on said debentures by way of principal and interest, and that said great value of said properties has been for some time known to said Clark and his associates.

27. Fidelity, on information and belief, denies that the acts of Clark and the Debenture-holders' Committee alleged in said Paragraph 27 formed part of any scheme or conspiracy between Clark and any

other party or parties whatsoever for any purpose whatsoever.

31.

Fidelity repeats with relation to Paragraph 31 the allegations of Paragraph 29 concerning the parties referred to as Clark's "said associates", and the matters admitted and averred in said Paragraph 29. Fidelity, on information and belief, denies each and every other allegation of said Paragraph 31.

B

E. Clarence Miller and Edward C. Dale (hereinafter sometimes referred to as "Stockholders") answer the Counterclaims made by Pioche Mines Consolidated, Inc. (hereinafter sometimes referred to as "Company") in Paragraphs 32, 33 and 34 of Defendants' Amended Answer as follows:

32.

Stockholders allege that the allegations of Paragraph 32 of Defendants' Amended Answer, including the allegations of Paragraphs 18 to 24, inclusive, and Paragraphs 26 and 27, re-alleged in said Paragraph 32, are immaterial, impertinent and irrelevant and fail to state a claim upon which relief can be granted.

Although Stockholders believe the allegations of said Paragraphs are immaterial, impertinent and irrelevant and fail to state a claim upon which relief can be granted, nevertheless, they admit, deny and allege in regard to the statements contained in the Paragraphs above referred to as follows:

18 to 24, inclusive. Stockholders, on information and belief, make the same admissions, allegations and denials with regard to said Paragraphs 18 to 24, inclusive, as are made by Fidelity-Philadelphia Trust Company under Paragraph 28 above.

26 and 27. Stockholders, on information and belief, make the same admissions, allegations and denials with regard to said Paragraphs 26 and 27 as are made by Fidelity-Philadelphia Trust Company under Paragraph 30 above.

33.

Stockholders admit that they were fully cognizant of the contents of the Complaint filed in the above entitled cause when they joined as parties-plaintiff in this suit, and aver that they joined as parties-plaintiff for the purposes more particularly set forth in the last paragraph of Paragraph XVII of the Complaint.

Stockholders deny that they, in collaboration and collusion with Percy H. Clark, Albert P. Gerhard and Robert F. Holden, Fidelity, or any other party or parties, caused copies of the Complaint, with accompanying papers, to be circulated and distributed among debenture-holders, or any of them, or among any other persons, or that they took any action intended to depreciate or destroy the values in defendant, Consolidated Company.

Stockholders, on information and belief, deny that said Complaint contains statements that were false and defamatory and that they neglected to secure

the true facts relating thereto, and on information and belief deny each and every other allegation of Paragraph 33 not herein particularly referred to.

34.

Stockholders deny each and every allegation of Paragraph 34.

THATCHER & WOODBURN,
/s/ By WM. WOODBURN.

CLARK, HEBARD & SPAHR,
/s/ By PERCY W. CLARK.

Duly Verified.

[Endorsed]: Filed April 10, 1941.

[Title of District Court and Cause.]

Exhibit "X"

SUPPLEMENTAL COMPLAINT

To the Honorable, the Judge of Said Court:

Fidelity - Philadelphia Trust Company (hereinafter sometimes referred to as "Fidelity"), corporate plaintiff, and Edward Dale, surviving individual plaintiff, two of the plaintiffs in the above entitled action, serve this Supplemental Complaint in accordance with Rule 15 (d) of the Federal Rules of Civil Procedure setting forth transactions, occurrences and events which have happened since the date of the Complaint, to wit:

I. That a Settlement Agreement was entered into under date of July 8, 1942, by and between John Janney, Richard K. Baker, representing themselves

as unsecured creditors of Pioche Mines Consolidated, Inc. and Pioche Mines Company and as stockholders of Pioche Mines Consolidated, Inc. (hereinafter designated as the "Creditors Committee"), Percy H. Clark, Robert F. Holden and Albert P. Gerhard, representing a majority of the deposited debenture bonds of Pioche Mines Consolidated, Inc., and also representing themselves as stockholders of Pioche Mines Consolidated, Inc. (hereinafter designated as the "Debenture Holders Committee"), Pioche Mines Consolidated, Inc. and Pioche Mines Company, for the purpose of reorganizing Pioche Mines Consolidated Inc., Pioche Mines Company and Nevada Volcano Mines Company so that the properties of these companies might at the earliest possible moment be turned into an enterprise profitable to the creditors and stockholders of said companies.

II. That said Settlement Agreement provides in substances as follows:

(a) For the vesting of the title to the properties of the above named constituent companies and certain other properties held in trust by John Janney in a new company at the time of the reorganization or immediately thereafter.

(b) For the issue by the new company of

1. Income bonds maturing in 30 years in face amount equal to the outstanding debenture bonds and the principal of all other debts as certified by Mr. Woods, the Treasurer and an independent accountant.

2. Preference notes payable in five years in face

amount equal to all new moneys furnished to pay the reasonable reorganization expenses which must be paid in cash as defined in the agreement.

3. Income notes maturing in 30 years in face amount equal to the principal amounts owed to emergency creditors as defined in the agreement and for reasonable reorganization expenses not paid in cash or preference notes.

4. Common stock.

47½% to be issued to the holders of outstanding common stock of Pioche Consolidated and stocks of Pioche Mines Company and Nevada Volcano Mines Company not held by the Consolidated Company, and

47½% to be issued to creditors of Pioche Consolidated and Pioche Mines Company of which 55% should be issued to Fidelity-Philadelphia Trust Company for the account of the debenture-holders and 45% should be issued to all other creditors, and

5% to be available to be issued to the preference note-holders as an inducement to furnishing the new moneys required by the company.

(c) That reasonable reorganization expenses shall include, in addition to the reasonable fee and disbursements of the debenture trustee, the reasonable disbursements of the Debenture Holders Committee, all other expenditures (not paid for by new moneys furnished to the corporation or by preference notes) in connection with the litigation pending in the United States Court for the district of Nevada and in connection with the proposed reorganization. The attorneys for Fidelity-Philadelphia Trust Company and Debenture Holders Committee are to receive

$35,000. face amount of income notes and the attorneys for the Pioche Mines and Consolidated companies and Mr. John Janney are to receive a like amount in income notes. The notes to be paid as fees to the attorneys for Fidelity and Debenture Holders Committee together with the 55% of 47½% of common stock to be issued to the debentureholders shall be delivered to Fidelity, as Trustee under the trust agreements under which the debentures are outstanding for the account of the debentureholders.

(d) That the notes and bonds shall contain the usual provisions for such instruments and specify the rate of interest, callable, sinking fund and other particular features to be incorporated in these instruments.

(e) That the purposes of the reorganization above stated are to be accomplished in a manner deemed most expedient by the attorneys for all parties concerned and it shall not be material whether the reorganization is accomplished through statutory merger and consolidation, through judicial reorganization under the federal laws or otherwise.

(f) That the stock of Nevada Volcano Mines Company held by John Janney in the Nevada Volcano Trust shall be delivered free and clear of the trust to the new company resulting from the reorganization.

(g) That the parties realize it will be necessary to obtain certain sums in cash in order to consummate the proposed reorganization and agree to use their best efforts to obtain such cash in exchange for

preference notes with stock bonus as above set forth.

(h) That the Debenture Holders Committee represents that it is acting under authorization dated June 8, 1942, from a majority of the owners of debentures deposited under the Debenture Holders Agreement dated February 1, 1939 (a copy of which is attached to the Complaint in the above entitled suit as Exhibit "J") which is made a part of the Settlement Agreement by reference and which empowers the Committee to negotiate the arrangement in the nature of a reorganization provided for in the Settlement Agreement for the purpose of avoiding and terminating litigation. The Committee agrees to use its best efforts to obtain the consent of all the undeposited debentures and all of the stockholders who are deposited or undeposited debenture-holders to the plan of reorganization.

(i) That the Creditors Committee represents that by executing the agreement it is giving the consent of Messrs. Janney and Baker to the settlement and that it will use its best efforts to obtain the consent of the directors of Pioche Consolidated and Pioche Mines Company and of all the creditors of any of the companies exclusive of the deposited debenture-holders and to obtain the consent of all of the stockholders of any of the companies involved except such stockholders as are holders of deposited debentures, that Mr. Baker will use his best efforts to obtain the consent from the emergency creditors and creditors other than the deposited debenture-holders and that Mr. Janney will use his best efforts to obtain the consent of the stockholders of the companies in-

volved and of the non-deposited debenture-holders and other creditors, and these two gentlemen agree to obtain the consent of the majority of the Boston creditors and of the stockholders and to sign the endorsements to the contract.

(j) That all parties agree that it will be in the best interests of the new company to negotiate and obtain a long-term lease of the properties of the new company under the terms of which an income will be assured to the new company, and all parties agree to use their best efforts to obtain for the new company such a lease which by its terms will be profitable to the new company; that the execution of the Settlement Agreement by Debenture Holders Committee was accompanied by the assurance given by John Janney that he would resume negotiations with Smelting Company at an early date and continue such negotiations with Smelting Company, or some other company financially sound and reputable, in good faith, for the purpose of consummating a lease as soon after the completion of the merger and reorganization as possible, and that he would consult with his New York attorneys, Messrs. Dwight, Harris, Koegel & Caskey, concerning legal matters involved in the lease and keep that firm informed from time to time of progress in order that it might be in position to facilitate the negotiations and keep the Debenture Holders Committee advised. No information concerning any such negotiations has been furnished to the Committee since the execution of the Settlement Agreement.

(k) That the holders of income bonds shall be en-

titled to a representative upon the Board of the new company.

(l) That the suit now pending in the above entitled cause shall be discontinued by all parties without costs in time to consummate the reorganization for which provision is made and that in the meantime said suit shall not be brought on for trial by any party.

A full true and correct copy of the Settlement Agreement is attached hereto marked Exhibit "A".

III. That the Debenture Holders Committee in accordance with the said agreement has used its best efforts to obtain the consent to the plan of reorganization of all of the debenture-holders who had not deposited their debentures with Fidelity prior to the execution of the Settlement Agreement and there now have been deposited with Fidelity as depositary $597,-600. of debentures (together with scrip and coupons appertaining thereto) comprising all of the debentures on the Committee's list. The holders of debentures which remain undeposited are members of John Janney's group and are not represented by or associated with the group of creditors represented by the Committee.

The Debenture Holders Committee also secured the consent of many stockholders who were the owners of deposited or undeposited debentures to the plan of reorganization by inducing them to sign proxies to vote at the meeting of the stockholders called by the company to be held on July 15, 1943. Such proxies representing approximately 190,000 shares and the parties named as proxies were present

at the meeting on July 15, 1943, and adjourned sessions of said meeting for the purpose of voting these shares for the approval of the settlement and merger agreements. The Debenture Holders Committee has performed each and all of the obligations undertaken by it by the Settlement Agreement.

IV. That Fidelity-Philadelphia Trust Company as trustee under the two trust agreements (dated January 2, 1929 and October 1, 1930) hereby certifies that $687,300. of debentures were certified by it as trustee under said trust agreements and still remain outstanding, and it certifies as depositary under the Debenture Holders Agreement that $597,600. of said debentures (together with scrip and coupons appertaining thereto) have been deposited with it as depositary under said agreement and it has issued its non-negotiable receipts to the depositors of such debentures, scrip and coupons, which receipts still remain outstanding.

V. That on or about November 22, 1943, at the request of Pioche Consolidated, Fidelity as depositary requisitioned that company for $582,350. of income bonds and 1,075,891 shares of stock for delivery to holders of its non-negotiable receipts giving the names and addresses in which such bonds and shares should be issued.

That on or about the 27th day of December, 1943, Pioche Mines Company and Nevada Volcano Mines Company were duly merged into Pioche Mines Consolidated, Inc. by a Merger Agreement duly authorized and certified filed in the office of the Secretary

of State of the state of Nevada as shown by the copy thereof which is duly certified by the Secretary of State of the state of Nevada attached hereto marked Exhibit "B".

That on or about the 24th day of April, 1944, Fidelity received a letter from Pioche Consolidated dated April 17, 1944, transmitting $539,800. of income bonds and 1,005,766 shares of capital stock of Pioche Consolidated, the surviving company, registered in names of parties on Fidelity's requisition; that Fidelity has never received from Pioche Consolidated the remaining bonds and stock listed on its requisition to be issued in the following names:

	Income Bonds	Stock
Henry G. Brooks	$ 2,500	4,125
E. W. Clark & Company	40,000	66,000
Fidelity-Philadelphia Trust Co.	50	....
	$42,550	70,125

That the above-mentioned $40,000. of debentures listed on Fidelity's requisition of November 22, 1943, in the name of E. W. Clark & Company are represented by a corresponding face value of Fidelity's non-negotiable receipts outstanding in the name of Drexel and Company. Fidelity has been requested to cause the new securities to be issued in the name of E. W. Clark & Co.

That on or about April 24, 1944, Fidelity received from Pioche Consolidated with the other securities above referred to $35,000. face amount of income notes registered in its name for the account of the

attorneys for Fidelity-Philadelphia Trust Company and Debenture Holders Committee.

VI. That Fidelity holds the debentures, scrip and coupons deposited with it as well as the income bonds, stock and income notes delivered to it by Pioche Consolidated as above set forth as depositary under the Debenture Holders Agreement for the protection of the debenture-holders and for the holders of its outstanding non-negotiable receipts, all as provided in said agreement which is a part of the Settlement Agreement, and because of the provisions of the Debenture Holders Agreement, Fidelity is unable to surrender the deposited debentures for cancellation and distribute the income bonds and stock to the holders of its non-negotiable receipts and the income notes to the said attorneys until defendants perform the remaining obligations (hereinafter more particularly set forth) imposed upon them by the terms of the settlement.

VII. That Fidelity as depositary under said Debenture Holders Agreement is fully authorized and prepared and has offered to surrender all deposited debentures to Fidelity as trustee under said two trust agreements for cancellation and to take any and all such further actions for the discontinuance of the above entitled suit as may be necessary and proper contemporaneously with the performance of corresponding obligations by defendants and other parties, and thereafter will distribute the new securities and cash to the parties entitled thereto and it is its desire and intention to cooperate with other parties for the

consummation of the proposed reorganization in accordance with the aforementioned agreements at the earliest possible date.

VIII. That Fidelity as trustee under the said two trust agreements and one of the plaintiffs in the above entitled suit upon the delivery to it of the outstanding debentures in the amount of $89,700. for cancellation and the performance by the parties of the several provisions of the Settlement Agreement will join with the other parties in the discontinuance of said suit.

IX. That E. Clarence Miller and Edward C. Dale, the other plaintiffs in said suit, signed proxies to be voted at the aforesaid meeting of Pioche Consolidated stockholders called for July 15, 1943, and will join in the discontinuance of said suit in time for the consummation of the proposed reorganization.

X. That defendants although repeatedly requested by Fidelity and Debenture Holders Committee to arrange for a closing settlement have steadfastly refused to negotiate such an arrangement and to take part in such a settlement.

XI. That the defendants and other parties to the Settlement Agreement have performed the same to the following extent and in the following particulars:

(a) That John Janney and Richard K. Baker, parties to the Settlement Agreement have secured consents to the plan of reorganization by the directors of Pioche Consolidated and Pioche Mines Companies and these companies have duly executed the

Settlement Agreement and have secured powers of attorney authorizing them to act for holders of undeposited debentures, other creditors and others in matters relating to the plan of reorganization.

(b) That defendants on or about December 27, 1943, caused Pioche Mines Company and Nevada Volcano Mines Company to be merged into Pioche Mines Consolidated, Inc., as more particularly above set forth.

(c) That Pioche Consolidated (the surviving company) has issued its income bonds and stock in response to Fidelity's requisition to the extent above set forth.

(d) Pioche Consolidated, the surviving company, has issued and delivered to Fidelity $35,000. in face amount of income notes to cover fees of attorneys of Fidelity and Committee as above set forth.

XII. That the defendants and/or the other parties to the Settlement Agreement have failed and neglected and continue to fail and neglect to perform said agreement in the following particulars:

(a) They have not delivered or caused to be delivered to Fidelity the $89,700. of outstanding undeposited debentures or the balance of the 1,112,287 reclassified shares to be held for the account of the outstanding debentures as provided in the Merger Agreement (Article Sixth 2).

(b) They have not issued and delivered to Fidelity the income bonds and stock to be distributed to the holders of $42,550. of Fidelity's non-negotiable receipts listed on Fidelity's requisition as above more particularly stated.

(c) They have not paid cash to Fidelity for the account of the parties entitled thereto in an amount sufficient to cover the reasonable reorganization expenses.

(d) They have failed to pay all other debts justly owed by Pioche Consolidated by the issuance and delivery of income bonds, income notes and stock or otherwise.

That the amount of such other debts as of July 8, 1942 is shown in two certificates by Dewey O. Simon, public accountant and auditor of Ely, Nevada, both dated November 7, 1943; the first showing the amount in principal only of all liabilities of Pioche Consolidated other than debentures, and the second showing the amount in principal only of all debts of Pioche Mines Company. Appended to these certificates is a third certificate signed by John Janney, President, and E. G. Woods, Secretary of Pioche Consolidated and Pioche Mines Company, showing the additional outstanding obligations as of said date not reflected on the books of Pioche Consolidated, that the original counterpart of said certificates is attached hereto marked Exhibit "C".

(e) Pioche Consolidated has not paid E. W. Clark & Co. $2,000. plus interest at the rate of 6% per annum from September 1, 1937, in payment of Pioche Consolidated's collateral note held by that firm, said note being one of the outstanding obligations shown on Dewey O. Simon's certificate above referred to.

Fidelity's non-negotiable receipt for $40,000. of deposited debentures (separate and distinct from the non-negotiable receipt for a similar amount de-

scribed in paragraph V on page 8) is held by E. W. Clark & Co., as collateral for said note. No income bonds are provided for in the Settlement Agreement or the Merger Agreement to be issued to the holder of this non-negotiable receipt which must be retired before or contemporaneously with the performance of other obligations, the discontinuance of the law suit and the distribution of the income bonds, income notes and stock of the surviving company held by Fidelity as depositary.

(f) Pioche Consolidated has failed to pay or provide for the expenses and reasonable fees of Fidelity for its services as trustee under the two trust agreements and its services as depositary under the Debenture Holders Agreement.

(g) Pioche Consolidated (surviving corporation) has failed immediately after the consummation of the merger to issue income bonds, income notes and preference notes as provided in the Merger Agreement in Article Seventh.

XIII. Fidelity has not been advised to what extent, if any, the other obligations assumed by defendants have been performed and therefore avers that to the best of its knowledge and belief

(a) John Janney has not vested title to the Mill site and other properties held in trust by him including a lease of the office building in Pioche Consolidated, the surviving company.

(b) John Janney has not delivered stock of the Nevada Volcano Mines Company held by him in the Nevada Volcano trust free and clear of the trust to Pioche Consolidated.

(c) Defendants have not issued and delivered $35,000. face amount of income notes to the attorneys for Pioche Consolidated, Pioche Mines Company and John Janney including Clarence M. Hawkins, attorney for Pioche Consolidated who is one of the creditors shown in Dewey O. Simon's certificate, paragraph XII (d) above, and who on or about April 11, 1945, filed a petition in this case claiming a fee in large amount to be due to him by Pioche Consolidated.

(d) Pioche Consolidated, surviving company, has not issued certificates for common stock of the par value of $1. per share in exchange for the outstanding $5. certificates share for share in accordance with the Settlement and Merger Agreements.

(e) Pioche Consolidated has not issued and sold 6% Five Year Preference notes together with bonus shares of the reclassified $1. par shares in face value equal to all new moneys required to pay the reasonable reorganization expenses which must be paid in cash in order to consummate the reorganization, although it has represented that cash will be required in settling accounts to be paid in cash as well as for certain expenses of reorganization, that the Settlement Agreement provides for these cash requirements by an issue of Preference notes and these notes to the extent necessary will be taken by less than ten of the company's stockholders.

(f) Defendants have failed to negotiate and obtain a long-term lease of the properties of surviving company under the terms of which an income would be assured to the new company as provided in the

Settlement Agreement and more particularly in Mr. Janney's letters.

XIV. That the partial performance of the Settlement Agreement by the parties has unalterably changed the relations of the parties to each other and to the enterprise and further delay in the consummation of the reorganization will jeopardize the interest of all concerned.

XV. That during the summer of 1943 Messrs. Hartshorn & Walter, 50 Congress Street, Boston, Mass., accountants, were engaged by Pioche Consolidated to audit its books and accounts, that a member of that firm went to Pioche for the purpose and both Fidelity and the Debenture Holders Committee furnished it with desired information on request.

That Pioche Consolidated has not delivered to Fidelity or Debenture Holders Committee any certificate showing the outstanding obligations of Pioche Consolidated after the merger or any balance sheet of Pioche Consolidated as of a date subsequent to the merger or any report of any kind made by Hartshorn and Walter or other accountants showing the financial condition of Pioche Consolidated after the merger.

XVI. Attached hereto are

(a) Copy of authorization from debenture-holders referred to in Article Seventh of the Debenture Holders Agreement duly certified by Fidelity as a correct copy marked Exhibit "D".

(b) Copy of Debenture Holders Agreement certified by Fidelity as a true and correct copy of said agreement dated as of February 1, 1939.

Wherefore, Plaintiffs pray:

I. This Court enter its order or orders directing defendants to produce a balance sheet of Pioche Consolidated showing the assets and liabilities of said company as of a recent date, or in the alternative

A report or reports of Hartshorn and Walter or other public accountant of good standing showing the status of the financial affairs of said company as of a recent date.

II. This Court enter its order or orders directing defendants to disclose the extent, if any, to which they have performed the other obligations enumerated in Article XIII of this Supplemental Complaint.

III. This Court enter its order or orders directing that the parties to this action perform the remaining unperformed obligations imposed upon them respectively by the Settlement and Merger Agreements and other documents above set forth at such times and in such manner as the Court shall direct.

IV. That plaintiffs, and each of them, have such other and further relief in the premises as may be just and proper and as circumstances of the case may in equity require.

THATCHER & WOODBURN,
/s/ By GEO. B. THATCHER,

CLARK, HEBARD & SPAHR,
/s/ By PERCY H. CLARK,

EXHIBIT "A"

Pioche Mines Consolidated, Inc.
Pioche, Nevada

SETTLEMENT AGREEMENT

Memorandum of Proposed Agreement to Reorganize Pioche Mines Consolidated, Inc., Pioche Mines Company and Nevada Volcano Mines Company, Either by Merger or Consolidation or Through Judicial Reorganization Proceedings.

This Memorandum of Agreement, entered into as of the 8th day of July, 1942, by and between John Janney and Richard K. Baker, representing themselves as unsecured creditors of Pioche Mines Consolidated, Inc. and Pioche Mines Company, and representing themselves as stockholders of Pioche Mines Consolidated, Inc. (hereinafter designated as the "Creditors' Committee"), Percy H. Clark, Robert F. Holden and Albert P. Gerhard, representing a majority of the deposited debenture bonds of Pioche Mines Consolidated, Inc., and also representing themselves as stockholders of Pioche Mines Consolidated, Inc. (hereinafter designated as the "Debenture Holders Committee"), Pioche Mines Consolidated, Inc., and Pioche Mines Company:

Witnesseth:

Whereas, it is the desire of all parties hereto, as speedily as possible, to accomplish a reorganization of Pioche Mines Consolidated, Inc., Pioche Mines Company and Nevada Volcano Mines Company, so that the properties of these companies may, at the

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earliest possible moment, be turned into an enterprise profitable to the creditors and stockholders of the above mentioned companies,

Now, Therefore, for the purpose of achieving the above purpose, the undersigned have agreed to the following general plan of reorganization;

1. A new company, which will, either at the time of the reorganization or immediately thereafter, be vested with title to the properties of the above mentioned companies and also with certain properties hereinafter defined, now held in trust by John Janney, will issue the following securities upon the following basis:

(A) Income bonds having a maturity date thirty (30) years from the date of issue, shall be issued in face amount equal to

(1) the principal of the company's present outstanding debenture bonds (not including any debentures which the Consolidated Company shall surrender to the trustee for cancellation);

(2) the principal of all other debts justly owed by the company, as certified by Mr. Woods and an independent accountant (except amounts owed to Pioche Mines Company and included in the notes to be issued to emergency creditors, as stated below).

There is specifically included as a debt justly owed by the company, the following:

(a) Claim of Richard K. Baker for breach of written contract giving him the exclusive right to sell stock of the company, settled for $25,000 principal of income bonds. Mr. Baker, as a part of the settle-

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ment, waives all claims to interest on advances which he has from time to time made and agrees to take his pro rata share of stock as one of the general creditors, as provided below.

(B) Preference notes payable five (5) years after date, but callable at any time at par, plus accrued interest, bearing interest at the rate of six per cent. (6%), shall be issued in face amount equal to all new moneys furnished to pay the reasonable reorganization expenses which must be paid in cash and which are more specifically defined below.

(C) Income notes having a maturity of thirty (30) years from their date shall be issued in face amount equal to the principal amounts owed

(1) to emergency creditors, as hereinafter defined;

(2) for reasonable reorganization expense, not paid in cash, or preference notes, as provided in paragraph VI of this agreement.

The term "emergency creditors" herein referred to means creditors who have a claim upon the assets of Pioche Mines Company, principally those who have loaned money to Pioche Mines Company to enable that company, in turn, to loan money to the Consolidated Company, which money was urgently needed in order to maintain the Consolidated Company. The total amount owing to emergency creditors shall not exceed $200,000. Without limiting the foregoing, the following items shall be included in the definition of emergency creditors:

First. Claims of Mr. John Janney arising out of sums of money expended for the account of or for

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the benefit of the Pioche Mines Company, settled for the sum of $12,000, to be paid in notes. This payment also settles all claims of the Exploration Syndicate arising out of certain resolutions of the Pioche Mines Company and closes the Syndicate accounts with the Pioche Mines Company; and also with Pioche Mines Consolidated, Inc., if there be any such account with that company. As part of this settlement, Mr. Janney will, with the consent of, and the approval of the reorganization plan by the Pioche Mines Company stockholders, deed the mill site property, free and clear of any trust, to the new company. He will also execute a 10-year lease to the new company covering the property known as the office building, which lease shall give the new company the right to use the office building, subject only to the right of Mr. Janney to use the building to the same extent to which he has heretofore so used it; the rental shall be at the nominal rate of $1.00 per year. As part of the settlement, Mr. Janney agrees to take his pro rata share of stock as one of the general creditors, as provided below, with respect to any interest on advances made by him to either Pioche Mines Company or the Consolidated Company, except that no interest shall be payable with respect to the sum of $12,000 principal involved as above stated in the settlement.

Second. To the extent that cash payment is not made, amounts of back salary due to Messrs. Grubbs, Hunt and Woods, which are not to exceed in the aggregate the sum of $12,950;

Third. Recent loans made to maintain the Pioche

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Mines and Consolidated Company from April 30, 1942 to date, when the reorganization shall be concluded;

Fourth. Outstanding notes given to secure cash advances in the nature of bank loans in so far as it is not necessary to pay such notes in cash or preference notes. These notes not to exceed the sum of $15,000.

With respect to reasonable reorganization expenses, referred to in B. and C. (2) supra, it is agreed that such expenses shall include, in addition to the reasonable fee and disbursements for the debenture trustee, the reasonable disbursements of the Debenture Holders Committee, all other expenditures (not paid for by new moneys furnished to the corporation or by preference notes) in connection with the litigation pending in the United States Court for the District of Nevada and in connection with the proposed reorganization. The attorneys for the Fidelity-Philadelphia Trust Company and Debenture Holders Committee are to receive $35,000 face amount of income notes, and the attorneys for the Pioche Mines and Consolidated companies and Mr. John Janney are to receive a like amount in income notes. The $35,000 face amount of income notes to be paid as fees to the attorneys for Fidelity-Philadelphia Trust Company and Debenture Holders Committee, together with the 55% of 47½% of common stock to be issued to the Debenture Holders as provided in I D. (2) hereof, shall be delivered to Fidelity-Philadelphia Trust Company, as trustee under the trust

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agreements under which the debentures are outstanding for the account of the debenture holders, and in consideration of these payments Pioche Mines Consolidated, Inc. and Pioche Mines Company shall be released from all obligation for the payment of legal fees to said attorneys on account of services rendered to Fidelity-Philadelphia Trust, Pioche Mines Company, and to said companies down to the date of the consummation of the proposed reorganization and lease.

(D) Common stock of the company, having a nominal par value, shall be issued so that, after the reorganization is completed,

(1) 47½% of the outstanding common stock will be for common stock of the Consolidated Company and the stock of Pioche Mines Company and Nevada Volcano Mines Company, not held by the Consolidated Company or John Janney as trustees, in proper proportion; and

(2) 47½% shall be issued to all creditors of Consolidated Company and Pioche Mines Company, including, but not by way of limitation, the present debenture holders and the emergency creditors, in such proportion that 55% of said 47½% of the common stock of the new company shall be issued to Fidelity-Philadelphia Trust Company for the account of the debenture holders. This issue of stock, together with the issue of the income bonds above provided for in I A., shall discharge all claims of the debenture holders for both principal and interest; and 45% of said 47½% of said stock shall be issued

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to all other creditors of the Consolidated Company and the Mines Company. This issue of stock, together with the issue of income bonds or income notes, as above provided, shall discharge all claims of the other creditors for both principal and interest; and

(3) 5% shall be available to be issued to the preference note holders as an inducement to furnishing the new moneys required by the new company.

II. The notes and bonds shall contain the usual provisions for such instruments and shall contain the following special provisions:

(A) Interest shall be payable upon the new income bonds and upon the new notes up to 4%, but only as earned; the directors to determine annually whether the new company, within the meaning of these clauses, has realized earnings. Proper provision should, however, be made so that the payment of interest can in fact be treated as interest for income tax purposes. Both the bonds and notes shall be callable at any time at par. Both the bonds and the notes shall share in a sinking fund, which is hereinafter described. Until all of the notes are retired, however, 50% of the sinking fund must each year be applied to the retirement of notes and 50% to the retirement of bonds. Sinking Fund may be used to buy bonds and notes at lowest price offered by any holders, or to retire notes and bonds at par, by lot.

III. Any income received by the new company shall first be applied to paying interest on the preference notes; thereafter any income received by the

Exhibit "A"—(Continued)

new company over and above operating expenses shall be used as follows:

(A) At the end of each designated fiscal year, the directors shall determine the amount of net earnings above operating expenses. This determination shall be made according to standard accounting practice but, irrespective of such practice and irrespective of accounting practices necessary in connection with tax purposes, the following items shall, for the purpose of the determination in this paragraph specified, be included as operating expenses (1) until all preference notes have been retired, interest and principal payments on the preference notes, (2) after all preference notes have been retired, a reserve for depletion in the sums permitted under United States income tax practice, (3) sums necessarily expended for the maintenance and repair of the property of the corporation. Any sum or sums expended in capital improvements shall not be included in operating expenses. Out of the amount which the directors shall so determine to be such net earnings, and after providing for payment of taxes, there shall first be paid interest not to exceed 4% on the bonds and notes, both issues to share pro rata in the available fund.

(B) After paying and providing for operating expenses, as above defined, and 4% interest on the notes and bonds, as above provided, and after making proper provision for the payment of all income and excess profits taxes and all other tax obligations of the company, the company shall then pay annually into a sinking fund 33⅓% of such balance of net

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earnings, and no dividend shall be declared and paid unless such sum has first been paid into such sinking fund, provided, however, that no dividend and sinking fund payments shall be made until an operating reserve fund of $25,000 (which shall include amounts, on hand, set aside for depletion) shall have been accumulated.

IV. The stock of the Nevada Volcano Mines Company held by Mr. John Janney in the Nevada Volcano Trust shall be delivered free and clear of the Trust to the new company resulting from the reorganization, with the consent of the Pioche Mines Company stockholders.

V. It is the purpose of the reorganization ultimately to vest title in one company of all of the properties of the Pioche Mines Consolidated Company, the Pioche Mines Company and the Nevada Volcano Mines Company. This result is to be accomplished in a manner which shall seem most expedient to the attorneys for all parties concerned. It shall not be material from the point of view of the parties consenting to this agreement whether the reorganization is accomplished through statutory merger and consolidation, through judicial reorganization under the federal laws, or otherwise.

VI. The parties hereto realize that it will be necessary to obtain certain sums in cash in order to consummate the proposed reorganization. All parties hereto agree to use their best efforts to obtain such cash in exchange for preference notes with stock

Exhibit "A"—(Continued)

bonus as above provided. The cash so obtained is to be used only to pay expenses which must be paid for in cash such as court fees, filing fees, recording fees, transfer, issue stamp and other taxes; all disbursements of attorneys for Fidelity Philadelphia Trust Company, the Debenture Holders Committee, the Creditors' Committee and attorneys of record in the Nevada litigation, and any proper wage or salary claims of Messrs. Grubbs, Hunt and Woods in so far as they demand cash payment. The cash or preference notes may be used, in so far as necessary, to repay the cash advances referred to in I C. Fourth hereof.

VII. The Debenture Holders Committee represents that it is acting under authorization from a majority of the deposited debenture holders, dated June 8, 1942, a true copy of which is annexed hereto as Exhibit "B", and that it is further acting by virtue of a Debenture Holders' Agreement dated February 1, 1939, which is made a part hereof by reference and which empowers the Debenture Holders Committee to negotiate with the Pioche Company, its creditors, stockholders and others interested, an arrangement in the nature of a reorganization or settlement for the purpose of avoiding or terminating litigation and such arrangement or settlement so negotiated shall be binding upon the holders of debentures and scrip (or overdue coupons) who shall have signed this agreement or deposited their debentures and scrip (or overdue coupons) hereun-

Exhibit "A"—(Continued)

der, when approved by the holders of a majority of the aggregate principal amount of the outstanding debentures. The Debenture Holders Committee warrants, by its signature hereto, that it has obtained the authority to bind a majority of the deposited debentures. The Debenture Holders Committee agrees to use its best efforts to obtain the consent of all of the undeposited debentures and all of the stockholders, who are deposited or undeposited debenture holders, to this plan or reorganization.

VIII. The Creditors' Committee represents that by executing this agreement, it is giving the consent of Mr. John Janney and Mr. Richard K. Baker to this agreement, and the Creditors' Committee will use its best efforts to obtain the consent to this agreement of the directors of Pioche Mines Consolidated, Inc. and Pioche Mines Company, and of all of the creditors of any of the companies herein involved, exclusive of the deposited debenture holders, and to obtain the consent of all of the stockholders of any of the companies involved, except such stockholders as are also holders of deposited debentures. It is understood that after this agreement has been approved by the Debenture Holders Committee, Mr. Richard K. Baker will forthwith use his best efforts to obtain the consent to this agreement from the emergency creditors and creditors other than the deposited debenture holders, and that Mr. Janney will use his best efforts to obtain a consent to this agreement from the stockholders of the companies herein involved

Exhibit "A"—(Continued)

and of the non-deposited debenture holders and other creditors. Immediately upon obtaining the consent of a majority of the Boston creditors, Mr. Richard K. Baker agrees either to sign the first endorsement hereof, as a representative of such majority, or to obtain a representative of such majority to sign said endorsement. Likewise, Mr. Janney, upon obtaining a consent of the majority of the stockholders involved, agrees to sign the second endorsement hereof, as representative of such majority, or agrees to obtain the signature of a representative of such majority.

IX. All of the parties hereto agree that it will be in the best interests of the new company to negotiate and obtain a long term lease of the properties of the new company under the terms of which an income will be assured to the new company. All parties hereto agree to use their best efforts to obtain for the new company such a lease which, by its terms, will be profitable to the new company.

X. It is agreed that the holders of the income bonds shall be entitled to a representative upon the board of directors of the new company by a method of selection hereafter to be agreed upon.

XI. The suit brought by the Trustee under the Pioche Mines Consolidated Trust Agreement for the company's debentures, against Pioche Mines Consolidated, Inc. and others, now pending, shall be discontinued by all parties without costs in time to consummate the reorganization for which provision is

Exhibit "A"—(Continued)

herein made. In the meantime, said suit shall not be brought on for trial by any party.

XII. The first endorsement herein is to be executed within ten (10) days after the signature hereof by the Debenture Holders Committee and the Creditors' Committee.

XIII. This agreement shall be binding in all respects upon the Debenture Holders Committee and the Creditors' Committee when the first endorsement is signed, even though the corporate parties hereto have not executed this agreement, provided that each of the corporate parties secures the authority of its board of directors and does execute this agreement within thirty (30) days after the signing of the first endorsement hereof.

XIV. The second endorsement herein is to be executed within sixty days (60) days after the signing of the first endorsement.

XV. If within ninety (90) days after the signature hereof by the first endorser the Creditors' Committee has not obtained the written consent hereto of 80% of all creditors (other than deposited debenture holders) of the Pioche Consolidated and Pioche Mines Company, then the Debenture Holders Committee may withdraw from this agreement.

XVI. If within ninety (90) days after the signature hereof by the first endorser, the Creditors' Committee has not obtained the written consent (in form of proxies or otherwise) of 66-2/3% of all Pioche

Exhibit "A"—(Continued)

Consolidated stockholders, then the Debenture Holders Committee may withdraw from this agreement.

In Witness Whereof, the undersigned have hereunto set their hands and seals as of the date written opposite their respective signatures.

July 16, 1942 JOHN JANNEY (L.S.)

July 16, 1942 RICHARD K. BAKER (L.S.)

July 8th, 1942 PERCY H. CLARK (L.S.)

July 8th, 1942 ROBERT F. HOLDEN (L.S.)

July 8th, 1942 ALBERT P. GERHARD (L.S.)

Aug. 7th, 1942 PIOCHE MINES COMPANY

Attest: by John Janney
E. G. Woods, Secretary President.
(Corporate Seal)

Aug. 7, 1942 PIOCHE MINES CONSOLIDATED, INC.,

Attest: by John Janney
E. G. Woods, Secretary President.
(Corporate Seal)

First Endorsement

I, Richard K. Baker, being duly authorized to represent a majority of creditors known as the Boston group of creditors, hereby, on behalf of myself and on their behalf, approve of the above agreement.

July 23, 1942 RICHARD K. BAKER (L.S.)

Exhibit "A"—(Continued)

Second Endorsement

I, John Janney, being duly authorized to represent a majority of the stock of Pioche Mines Consolidated, Inc., a majority of the stock of Pioche Mines Company, and a majority of the stock of Nevada Volcano Mines Company, hereby, on behalf of myself and on their behalf, approve of the above agreement.

Sept. 18, 1942 JOHN JANNEY (L.S.)

EXHIBIT "B"

Office of Malcolm McEachin, Secretary of State

The State of Nevada—Department of State

I, Malcolm McEachin, the duly elected, qualified and acting Secretary of State of the State of Nevada, do hereby certify that the annexed is a true, full and correct transcript of the original Merger Agreement between Pioche Mines Consolidated, Inc., as the surviving corporation merging Pioche Mines Company and Nevada Volcano Mines Company into the surviving corporation and reducing authorized capital stock of the surviving corporation to 5,000,000 shares of $1.00 par value of $5,000,000.00 as the same appears on file and of record in this office.

In Witness Whereof, I have hereunto set my hand and affixed the Great Seal of State, at my office in Carson City, Nevada, this 20th day of January, A.D. 1944.

[Seal] /s/ MALCOLM McEACHIN,
Secretary of State.
/s/ By MURIEL LITTLEFIELD,
Deputy.

Exhibit "B"—(Continued)
MERGER AGREEMENT

This Agreement of Merger made this 23rd day of October, 1942, by and between Pioche Mines Consolidated, Inc., hereinafter designated as Surviving Corporation, Pioche Mines Company, hereinafter designated as Mines Company and Nevada Volcano Mines Company, hereinafter designated as Volcano Company, all having their principal offices in the Town of Pioche, County of Lincoln, State of Nevada, all Nevada corporations, acting by and with the approval of a majority of the directors of each said corporations.

Witnesseth:

Whereas, Surviving Corporation has an authorized capital stock of Two Million Five Hundred Thousand (2,500,000) shares of common stock with a par value of Five Dollars ($5.00) each of which Two Million Twenty-Two Thousand Three Hundred Forty (2,022,340) shares are now issued and outstanding; and

Whereas, Mines Company has an authorized capital stock of One Million (1,000,000) shares of common stock with a par value of Five Dollars ($5.00) each, of which Nine Hundred Ninety-Nine Thousand Two Hundred Thirty-One (999,231) shares are now issued and outstanding; and

Whereas, Volcano Company has an authorized capital stock of One Million (1,000,000) shares of common stock with a par value of One Dollar ($1.00) each of which Six Hundred Nine Thousand Six Hundred and Eleven (609,611) shares are now issued and outstanding; and

Exhibit "B"—(Continued)

Whereas, the directors, or a majority of them, of each of the above named corporations, desire to merge Mines Company and Volcano Company into Surviving Corporation on the terms and conditions and in the mode, manner and basis hereinafter set forth and meetings of the stockholders of the respective corporations are being called for the purpose of considering and taking action upon this Agreement of Merger;

Now, Therefore, pursuant to the laws of the State of Nevada in such case made and provided, the parties hereto, in consideration of the mutual covenants and agreements hereinafter contained, do hereby agree to merge and do merge Mines Company and Volcano Company into surviving corporation, on the terms and conditions and in the mode, manner and basis hereinafter set forth, to wit:

First: The name of the Surviving Corporation shall continue to be Pioche Mines Consolidated, Inc.

Second: The number of Directors who shall manage its affairs shall be seven.

Third: The names and post office addresses of the Directors of such corporation for the first year are as follows:

John Janney, Pioche, Nevada.
A. C. Milner, Salt Lake City, Utah.
Morgan G. Heap, Pioche, Nevada.
J. Harry Crafton, Staunton, Va.
E. G. Woods, Pioche, Nevada.
Augustus L. Putnam, Boston, Mass.
Robert F. Holden, Philadelphia, Pa.

Exhibit "B"—(Continued)

Fourth: The amount of the total authorized capital stock is hereby changed from 2,500,000 shares of the par value of $5.00 each or a total of $12,500,000, to 5,000,000 shares of the par value of $1.00 each or a total par value of $5,000,000, full paid and non-assessable.

Fifth: The value of the properties owned by Surviving Corporation as of the date of this Agreement are hereby declared to be of a value at least equal to the face value of the bonds and notes plus the par value of the stock of Surviving Corporation authorized hereunder.

Sixth: The reduction of the capital stock of Surviving Corporation, above provided for, shall be accomplished as follows:

A. The 477,660 shares of authorized stock of Surviving Corporation of the par value of $5.00 each held unissued in the Treasury at the time this merger becomes effective, shall be cancelled.

B. All of the shares of the par value of $5.00 each of Surviving Corporation, issued and outstanding, prior to the consummation of this merger, shall be reclassified into 5,000,000 shares of the par value of $1.00 each in the manner provided by the laws of the State of Nevada and shall be disposed of as follows:

1. 2,022,340 of the reclassified shares of the par value of $1.00 each shall be issued to existing shareholders in exchange—(a) share for share for the old shares of Surviving Corporation, surrendered for reclassification as above, that is a total of 1,877,-

Exhibit "B"—(Continued)

421 shares, and (b) outstanding shares of Mines Company and Volcano Company not exchanged for shares of Surviving Corporation prior to this merger, and therefore not owned by that company, at the following rates of exchange:

Shareholders of Mines Company who have heretoaccepted the Volcano Trust and thus acquired an interest in Volcano shares, shall receive one reclassified share of Surviving Corporation for each such Mines Company share surrendered in exchange.

Shareholders of Mines Company who have not heretofore accepted the Volcano Trust shall receive one-half of a reclassified share of Surviving Corporation for each such Mines Company share surrendered.

Shareholders of Volcano Company shall receive one-half of a reclassified share of Surviving Corporation for each such Volcano Company share surrendered.

This subdivision (b) of subdivision 1. will require the issue of no more than 144,919 reclassified shares of Surviving Corporation.

2. 1,112,287 of the reclassified shares of the par value of $1.00 each shall be issued to existing debenture holders in such names as Fidelity Philadelphia Trust Company (Trustee under trust agreements dated January 2, 1929 and October 1, 1930, under which debentures of Surviving Corporation are outstanding) shall direct and be delivered to Fidelity Philadelphia Trust Company for the account of the outstanding debentures.

3. 910,053 of the reclassified shares of the par

Exhibit "B"—(Continued)

value of $1.00 each shall be issued to the existing creditors of Surviving Corporation, and Mines Company, other than debenture-holders.

4. 212,878 of the reclassified shares of the par value of $1.00 each shall be issued as part consideration to those persons who provide the cash not to exceed $100,000.00 required for certain expenses which are to be paid in cash, all in accordance with the settlement agreement elsewhere referred to in this Agreement of Merger.

5. 742,442 of the reclassified shares of the par value of $1.00 each will remain in the Treasury and may be disposed of from time to time as may be permitted by law and as directed by the Board of Directors of Surviving Corporation for treasury purposes.

6. Stockholders of Surviving Corporation, Mines Company and/or Volcano Company shall surrender and return the certificates of stock of the respective corporations to Surviving Corporation and upon such presentation and surrender and not otherwise shall be entitled to receive the reclassified shares of stock of Surviving Corporation in the amounts above provided.

Seventh: All creditors who relinquish their debts and surrender debentures, notes and other obligations of Pioche Mines Consolidated, Inc., and Pioche Mines Company, as hereinafter provided, are obligated to accept in full payment of all such debts and obligations stock and securities of surviving corporation as hereinbefore and hereinafter provided.

Exhibit "B"—(Continued)

Accordingly it is agreed that Surviving Corporation immediately after the consummation of the merger shall issue the following securities:

1. Income bonds in the face amount not to exceed One Million Two Hundred Thousand Dollars ($1,200,000), the principal of which shall be due thirty years from the date of issue, bearing 4% interest payable annually, payment in each year to be made only if earned and to be non-cumulative, callable at par or subject to lowest bid offer as hereinafter provided. Said bonds shall be registered and shall be transferable only on the books of Surviving Corporation and may be in denomination of $100, $500, $1,000 and $10,000. Said bonds may be issued for the following considerations:

(a) Outstanding debentures of Surviving Corporation at face amount of such debentures, i.e., $602,050.

(b) The principal amount of other debts owed by Consolidated, estimated not to exceed $471,655.40.

2. Income notes in the face amount not to exceed $340,000. the principal of which shall be due thirty years from the date of issue, bearing 4% payable annually, payment in each year to be made only if earned, and to be non-cumulative, said notes to be callable at par, or subject to lowest bid offer as hereinafter provided. Said notes shall be registered and shall be transferable only on the books of Surviving Corporation and may be in denominations of $100,

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$500, $1,000, and $10,000. Said notes may only be issued for the following considerations:

(a) The principal amount of Mines Company obligations estimated not to exceed $200,000.

(b) Reasonable reorganization expenses and expenses of all parties to the litigation in the United States District Court for the District of Nevada which is to be settled as provided in a certain Agreement between Surviving Corporation, Mines Company and a representative of a majority of the bondholders and the principal active creditors dated July 8, 1942, and herein referred to as the Settlement Agreement, estimated not to exceed the sum of One Hundred Thousand Dollars ($100,000).

(c) Certain other obligations estimated not to exceed Forty Thousand Dollars ($40,000) more particularly described in said Settlement Agreement, part of which it may prove desirable to pay in cash.

3. In order to meet cash requirements for such expenses as must be met in cash incident to the reorganization and other necessary expenses, as provided in the Settlement Agreement, the surviving Corporation is authorized to issue 6%, 5-year notes in aggregate amount not to exceed $100,000.00, to provide for such necessary cash requirements, which notes shall be called preference notes, and shall be subject to the preference hereinafter provided for in this contract.

4. The income bonds and income notes herein-

Exhibit "B"—(Continued)

above provided for shall have equal standing with respect to interest and in the event the Surviving Corporation should not in any year have earnings, as hereinafter in Paragraph Ninth defined, sufficient to pay interest in full on both the income bonds and income notes, the amount of income available, if any, shall be divided among the holders of both such issues in proportion to face amount of such bonds and notes held by each of them respectively.

Eighth: The notes and bonds above provided for, shall contain the usual provisions for such instrument and shall contain the following provisions:

(a) Interest shall be payable upon the new income bonds and upon the new notes up to 4%, but only as earned, the directors to determine annually whether the new company, within the meaning of these clauses, has realized earnings. Proper provisions should, however, be made so that the payment of interest can in fact be treated as interest for income tax purposes. Both bonds and notes shall be callable at par, at any time, or shall be subject to the lowest bid offered. Both the bonds and notes shall share in a sinking fund, which is hereinafter described. Until all the notes are retired, however, 50% of the sinking fund must each year be applied to the retirement of notes and 50% to the retirement of bonds. Sinking fund may be used to buy bonds and notes at lowest price offered by the holders, or to retire notes and bonds at par by lot.

Ninth: Any income received by the Surviving Cor-

Exhibit "B"—(Continued)

poration shall first be applied to paying interest on the preference notes; thereafter any income received by the Surviving Corporation over and above operating expenses shall be used as follows:

(a) At the end of each designated fiscal year, the directors shall determine the amount of net earnings above operating expenses. This determination shall be made according to standard accounting practice but, irrespective of such practice and irrespective of accounting practices necessary in connection with tax purposes, the following items, shall for the purposes of the determination in this paragraph specified, be included as operating expenses (1) until all preference notes have been retired interest and principal payments on the preference notes, (2) after all preference notes have been retired, a reserve for depletion in the sums permitted under United States income tax practice, (3) sums necessarily expended for the maintenance and repair of the property of the corporation. Any sum or sums expended in capital improvement shall not be included in operating expenses. Out of the amount which the directors shall so determine to be such net earnings, and after providing for payment of taxes, there shall first be paid interest not to exceed 4% on the bonds and notes, both issues to share pro rata in the available fund.

(b) After paying and providing for operating expenses, as above defined and 4% interest on the notes and bonds, as above provided, and after making proper provisions for the payment of all income and

Exhibit "B"—(Continued)

excess profits taxes and all other tax obligations of the company, the Surviving Corporation shall then pay annually into a sinking fund 33⅓% of such balance of net earnings, and no dividend shall be declared and paid unless such sum has first been paid into such sinking fund, provided, however, that no dividend and sinking fund payments shall be made until an operating reserve fund of $25,000.00 (which shall include amounts on hand set aside for depletion) shall have been accumulated.

In Witness Whereof, the parties hereto have caused this Agreement to be executed in their respective names by their respective officers and have caused their respective seals to be affixed hereto, and a majority of the directors of Pioche Mines Consolidated, Inc., and a majority of the directors of Pioche Mines Company, and a majority of the directors of Nevada Volcano Mines Company, have signed this Agreement of Merger under their respective corporate seals as of the day and year first above written.

[Seal] JOHN JANNEY
W. A. TULLOCH
MORGAN G. HEAP
E. G. WOODS
ALFRED HUNT

Attest:

E. G. WOODS, Secretary,
Pioche Mines Consolidated, Inc.

Being a Majority of the Directors of Pioche Mines Consolidated, Inc.

Exhibit "B"—(Continued)

[Seal] JOHN JANNEY
W. A. TULLOCH
MORGAN G. HEAP
E. G. WOODS
ALFRED HUNT

Attest:

E. G. WOODS, Secretary,
Pioche Mines Company

Being a Majority of the Directors of Pioche Mines Company.

[Seal] JOHN JANNEY
A. W. THOMAS
ALFRED HUNT
CHAS. CULVERWELL
MORGAN G. HEAP

Attest:

E. G. WOODS, Acting Assistant Secretary,
Nevada Volcano Mines Company.

Being a Majority of the Directors of Nevada Volcano Mines Company.

SECRETARY'S CERTIFICATE

I, E. G. Woods, Secretary of Pioche Mines Consolidated, Inc., a corporation of the State of Nevada (hereinafter called Surviving Corporation), do hereby certify as such Secretary and under the seal of said corporation, in accordance with the provisions of Section 39 of the Domestic Corporation Law, as amended, and other applicable laws of the State of Nevada:

The foregoing Agreement of Merger between Sur-

Exhibit "B"—(Continued)

viving Corporation, Pioche Mines Company and Nevada Volcano Mines Company, providing that Pioche Mines Company and Nevada Volcano Company shall be merged into Surviving Corporation, after having been first duly signed by a majority of the directors of Surviving Corporation, by a majority of the directors of Pioche Mines Company and by a majority of the directors of Nevada Volcano Company was submitted to the stockholders of Surviving Corporation, at a meeting thereof called separately from any meeting of the stockholders of either of the other merged corporations and duly called and held after notice given in accordance with the provisions of said General Corporation Law of the State of Nevada, for the purpose of considering and taking action upon said Agreement of Merger:

The only class of authorized capital stock of Surviving Corporation is voting common stock and at said meeting such Agreement of Merger was considered and a vote by ballot in person or by proxy was taken for the adoption or rejection of the same, each share of stock entitling the holder thereof to one vote and the votes of stock so voting together representing more than a majority of the issued and outstanding shares of Surviving Corporation, were cast for the approval and adoption of said Agreement of Merger.

Said Agreement was thereby at said meeting duly adopted as the act of stockholders of Surviving Corporation.

Exhibit "B"—(Continued)

In Witness Whereof, I have hereunto signed my name and affixed the seal of Pioche Mines Consolidated, Inc., this 17th day of December, 1943.

[Seal] E. G. WOODS, Secretary,
Pioche Mines Consolidated, Inc.

Attest:

E. G. WOODS, Secretary
Pioche Mines Consolidated, Inc.

SECRETARY'S CERTIFICATE

I, E. G. Woods, Secretary of Pioche Mines Company, a corporation of the State of Nevada, do hereby certify as such Secretary and under the seal of said corporation, in accordance with the provisions of Section 39 of the Domestic Corporation Law, as amended, and other applicable laws of the State of Nevada:

The foregoing Agreement of Merger between Surviving Corporation, Pioche Mines Company and Nevada Volcano Mines Company, providing that Pioche Mines Company and Nevada Volcano Mines Company shall be merged into Surviving Corporation, after having been first duly signed by a majority of the directors of Surviving Corporation, by a majority of the directors of Pioche Mines Company and by a majority of the directors of Nevada Volcano Mines Company was submitted to the stockholders of Pioche Mines Company, at a meeting thereof called separately from any meeting of the stockholders of either of the other merged corporations and duly called and held after notice

Exhibit "B"—(Continued)

given in accordance with the provisions of said General Corporation Law of the State of Nevada, for the purpose of considering and taking action upon said Agreement of Merger.

The only class of authorized capital stock of Pioche Mines Company is voting common stock and at said meeting such Agreement of Merger was considered and a vote by ballot in person or by proxy was taken for the adoption or rejection of the same, each share of stock entitling the holder thereof to one vote and the votes of stock so voting together representing more than a majority of the issued and outstanding shares of Pioche Mines Company, were cast for the approval and adoption of said Agreement of Merger.

Said Agreement was thereby at said meeting duly adopted as the act of stockholders of Pioche Mines Company.

In Witness Whereof, I have hereunto signed my name and affixed the seal of Pioche Mines Company, this 20th day of December, 1943.

[Seal] E. G. WOODS,
Secretary, Pioche Mines Company

Attest:
E. G. WOODS, Secretary,
Pioche Mines Company.

SECRETARY'S CERTIFICATE

I, E. G. Woods, Assistant Secretary of Nevada Volcano Mines Company, a corporation of the State

Exhibit "B"—(Continued)

of Nevada, do hereby certify as such Secretary and under the seal of said corporation, in accordance with the provisions of Section 39 of the Domestic Corporation Law, as amended, and other applicable laws of the State of Nevada:

The foregoing Agreement of Merger between Surviving Corporation, Pioche Mines Company and Nevada Volcano Mines Company, providing that Pioche Mines Company and Nevada Volcano Mines Company shall be merged into Surviving Corporation, after having been first duly signed by a majority of the directors of Surviving Corporation, by a majority of the directors of Pioche Mines Company and by a majority of the directors of Nevada Volcano Mines Company was submitted to the stockholders of Pioche Mines Company, at a meeting thereof called separately from any meeting of the stockholders of either of the other merged corporations and duly called and held after notice given in accordance with the provisions of said General Corporation Law of the State of Nevada, for the purpose of considering and taking action upon said Agreement of Merger;

The only class of authorized capital stock of Nevada Volcano Mines Company is voting common stock and at said meeting such Agreement of Merger was considered and a vote by ballot in person or by proxy was taken for the adoption or rejection of the same, each share of stock entitling the holder thereof to one vote and the votes of stock so voting together representing more than a majority of the

Exhibit "B"—(Continued)

issued and outstanding shares of Nevada Volcano Mines Company, were cast for the approval and adoption of said Agreement of Merger.

Said Agreement was thereby at said meeting duly adopted as the act of stockholders of Nevada Volcano Mines Company.

In Witness Whereof, I have hereunto signed my name and affixed the seal of Nevada Volcano Mines Company, this 23rd day of December, 1943.

[Seal] E. G. WOODS,
Assistant Secretary, Nevada Volcano Mines Company.

Attest:
E. G. Woods, Assistant Secretary,
Nevada Volcano Mines Company.

MERGER AGREEMENT EXECUTED

The Above Agreement of Merger between Pioche Mines Consolidated, Inc., Pioche Mines Company and Nevada Volcano Mines Company, all being corporations duly created, organized and existing under the laws of the State of Nevada, having been duly declared advisable and authorized by the Boards of Directors of each of said corporations, duly executed by a majority of the Boards of Directors of each of said corporations and duly approved and adopted by the stockholders of each of said corporations in accordance with the General Corporation Law of the State of Nevada, the Pres-

Exhibit "B"—(Continued)

ident and the Secretary of each of said corporations do hereby execute said Agreement of Merger under the corporate seals of their respective corporations by authority of the directors and stockholders thereof as the act, deed and agreement of each of said corporations and each of said corporations has caused said Agreement of Merger to be signed in its name and on its behalf by its President and its Secretary, and caused its corporate seal to be thereto affixed and attested by its Secretary.

Done this 24th day of December, 1943.

[Seal] PIOCHE MINES CONSOLIDATED, INC.
By JOHN JANNEY, President
E. G. WOODS, Secretary

Attest:
E. G. WOODS, Secretary.

[Seal] PIOCHE MINES COMPANY,
By JOHN JANNEY, President
E. G. WOODS, Secretary

Attest:
E. G. WOODS, Secretary.

[Seal] NEVADA VOLCANO MINES CO.
By JOHN JANNEY, President
E. G. WOODS, Secretary

Attest:
E. G. WOODS, Secretary.

Exhibit "B"—(Continued)

State of Nevada,
County of Lincoln—ss.

Be It Remembered, that on this 24th day of December, 1943, personally came before me a Notary Public, in and for the County and State aforesaid, John Janney, President of Pioche Mines Consolidated, Inc., a corporation of the State of Nevada, and one of the corporations described in and which executed the foregoing Agreement of Merger between Pioche Mines Consolidated, Inc., Pioche Mines Company and Nevada Volcano Mines Company, all Nevada corporations, who is personally known to me and known to me to be such President and the same person whose name is subscribed to the Agreement of Merger as said President, and acknowledged that said Agreement of Merger was the act, deed and agreement of said Pioche Mines Consolidated, Inc.; that the signatures of said President and Secretary of said corporation to the foregoing Agreement of Merger are in the proper handwriting of said President and Secretary and that the seal affixed to said Agreement of Merger is the common corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and seal of office, the day and year aforesaid.

[Seal] GLENDA P. QUIRK,
Notary Public.

Exhibit "B"—(Continued)

State of Nevada,
County of Lincoln—ss.

John Janney being duly sworn deposes and says:

That he is the President of Pioche Mines Consolidated, Inc., a Nevada corporation, who executed the foregoing Agreement of Merger between Pioche Mines Consolidated, Inc., Pioche Mines Company and Nevada Volcano Mines Company, all Nevada Corporations; that the Merger to be effected, in accordance therewith, was duly advised, authorized and approved by the Board of Directors and stockholders of Pioche Mines Consolidated, Inc., in the manner and by the vote required by the laws of the State of Nevada.

JOHN JANNEY

Sworn to and subscribed before me this 24th day of December, 1943.

[Seal] GLENDA P. QUIRK,
Notary Public.

State of Nevada,
County of Lincoln—ss.

Be It Remembered, that on this 24th day of December, 1943, personally came before me a Notary Public, in and for the County and State aforesaid, John Janney, President of the Pioche Mines Company, a corporation of the State of Nevada, and one of the corporations described in and which executed the foregoing Agreement of Merger between Pioche Mines Consolidated, Inc., Pioche Mines

Exhibit "B"—(Continued)

Company and Nevada Volcano Mines Company, all Nevada corporations, who is personally known to me and known to me to be such President and the same person whose name is subscribed to the Agreement of Merger as said President, and acknowledged that said Agreement of Merger was the act, deed and Agreement of said Pioche Mines Company; that the signatures of said President and Secretary of said corporation to the foregoing Agreement of Merger are in the proper handwriting of said President and Secretary and that the seal affixed to said Agreement of Merger is the common corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and seal of office, the day and year aforesaid.

[Seal] GLENDA P. QUIRK,
Notary Public.

State of Nevada,
County of Lincoln—ss.

John Janney being duly sworn deposes and says:

That he is the President of Pioche Mines Company, a Nevada corporation, who executed the foregoing Agreement of Merger between Pioche Mines Consolidated, Inc., Pioche Mines Company and Nevada Volcano Mines Company, all Nevada corporations; that the Merger to be effected, in accordance therewith, was duly advised, authorized and approved by the Board of Directors and stockholders of Pioche Mines Company, in the manner and

Exhibit "B"—(Continued)

by the vote required by the laws of the State of Nevada.

JOHN JANNEY

Sworn to and subscribed before me this 24th day of December, 1943.

[Seal] GLENDA P. QUIRK,
Notary Public.

State of Nevada,
County of Lincoln—ss.

Be It Remembered, that on this 24th day of December, 1943, personally came before me a Notary Public, in and for the County and State aforesaid, John Janney, President of the Nevada Volcano Mines Company, a corporation of the State of Nevada, and one of the corporations described in and which executed the foregoing Agreement of Merger between Pioche Mines Consolidated, Inc., Pioche Mines Company and Nevada Volcano Mines Company, all Nevada corporations, who is personally known to me and known to me to be such President and the same person whose name is subscribed to the Agreement of Merger as said President, and acknowledged that said Agreement of Merger was the act, deed and agreement of said Nevada Volcano Mines Company; that the signatures of said President and Assistant Secretary of said corporation to the foregoing Agreement of Merger are in the proper handwriting of said President and Assistant Secretary and that the seal af-

Exhibit "B"—(Continued)

fixed to said Agreement of Merger is the common corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and seal of office, the day and year aforesaid.

[Seal] GLENDA P. QUIRK,
Notary Public.

State of Nevada,
County of Lincoln—ss.

John Janney being duly sworn deposes and says:

That he is the President of the Nevada Volcano Mines Company, a Nevada corporation, who executed the foregoing Agreement of Merger between Pioche Mines Consolidated, Inc., Pioche Mines Company, and Nevada Volcano Mines Company, all Nevada corporations; that the Merger to be effected, in accordance therewith, was duly advised, authorized and approved by the Board of Directors and stockholders of Nevada Volcano Mines Company, in the manner and by the vote required by the laws of the State of Nevada.

JOHN JANNEY

Sworn to and subscribed before me this 24th day of December, 1943.

[Seal] GLENDA P. QUIRK,
Notary Public.

[Endorsed]: Merger Agreement Between Pioche Mines Consolidated, Inc., as the Surviving Corporation merging Pioche Mines Company and Nevada

EXHIBIT "B"—(Continued.)

Volcano Mines Company into the Surviving Corporation and reducing authorized capital stock of the Surviving Corporation to 5,000,000 shs. of $1.00 par value or $5,000,000.00.

Filed at the request of John Janney, Pres., Pioche Mines Consolidated, Pioche, Nevada, Dec. 27, 1943. Malcolm McEachin, Secretary of State. By Muriel Littlefield, Deputy Secretary of State.

EXHIBIT "D"

[Printer's Note: Pertinent portions of Exhibit "D" entitled "Pioche Debenture-Holders' Agreement dated as of February 1, 1939" are set out at pages 98-111 as Exhibit "J" to Original Complaint.]

[Endorsed]: Filed May 16, 1946.

[Title of District Court and Cause.]

MORE DEFINITE STATEMENT

Comes Now plaintiffs and furnish a more definite statement of those matters in its supplemental complaint, pursuant to the order of this Court entered on the 11th day of February, 1947.

1. The words "John Janney's Group" as used in line 29, page 6 of plaintiffs' supplemental complaint refer to those debenture holders who have not deposited their debentures. Messrs. John E. Zimmermann, Percy H. Clark, after visiting Pioche in October, 1928, interested some of their friends in subscribing to Pioche debentures of the 1929 issue

to an amount in excess of Two hundred fifty thousant Dollars ($250,000.00). Later, John Janney was instrumental in selling additional debentures of the 1929 issue to other parties, some of whom do not reside in Philadelphia and are not associated with the Zimmermann-Clark group. After the fire in the mill in the fall of 1929, John Janney made efforts to sell debentures of the issue of 1930 and succeeded in placing debentures of that issue to a considerable amount with members of the Zimmermann-Clark group, and to others not associated with the group, some of whom did not reside in Philadelphia. All of the Zimmermann-Clark group, as well as some of those originally interested by John Janney, have deposited their debentures with Fidelity. The Debenture Holders Committee now represents all of those who have deposited.

2. The words "closing settlement" contained in paragraph X of plaintiffs' supplemental complaint are intended to designate a meeting at which the several parties in interest will contemporaneously perform the unperformed obligations imposed upon them by the settlement agreement.

3. The words "the defendants and/or the other parties to the Settlement Agreement" contained in lines 3 and 4 on page 11 and the words "they" contained in lines 7, 12, 16 and 19 on page 11 of plaintiffs' supplemental complaint refer to Pioche Consolidated, John Janney, Richard K. Baker and those persons who have by powers of attorney authorized Richard K. Baker and John Janney or either of them

to represent such persons in matters connected with the plan of reorganization.

Dated: This 26th day of February, 1947.

CLARK, HEBARD & SPAHR,
THATCHER, WOODBURN & FORMAN,
/s/ By WM. FORMAN,
Attorneys for Plaintiffs.

Acknowledgment of Service attached.

[Endorsed]: Filed Feb. 27, 1947.

[Title of District Court and Cause.]

ANSWER TO SUPPLEMENTAL COMPLAINT

Answering Plaintiffs' Supplemental Complaint, defendants admit, deny and allege as follows:

1. Defendants admit that they entered into a Settlement Agreement, but deny that said Agreement was entered into under date of July 8, 1942 except as to the Debenture-holders represented by Debenture-Holders' Committee, Percy H. Clark, Albert P. Gerhardt and Robert F. Holden; and allege that the other parties entered into the Settlement Agreement under dates appearing opposite their signatures as set forth in said Agreement and not before, and defendants allege that Plaintiffs' allegation as to the date of said Agreement is material to the rights of defendants and of such other parties, and allege it was and is a part of the Agreement that the Debenture-holders were definitely obligated while other parties to the Settlement Agreement had the right, privilege and option to

accept or reject said Agreement during periods of time set forth in the Settlement Agreement, and further allege that the Debenture-Holders' Committee were informed, and understood, that the other parties to the settlement had refused to give and would not give consideration to any settlement on any basis other than that the Debenture-holders, represented by Debenture-Holders' Committee, must be definitely bound to the terms of a settlement as proposed, before defendants and especially defendant companies and the other creditors would give consideration thereto. And further answering Paragraph I, Defendants admit that the said Settlement Agreement was for the purpose of reorganization but allege that said Agreement was also for the purpose of avoiding or terminating litigation and arriving at a settlement of the action of Plaintiffs against Defendants, and also a settlement of the counter-action of Defendants against Plaintiffs.

2. Answering Paragraph II of Supplemental Complaint, defendants deny generally the allegation that Settlement Agreement provides in substance as set forth therein, excepting subparagraphs a, b, d, e and k thereof, and in reference to subparagraphs c, f, g, h, i, j and l defendants specifically deny that Settlement Agreement provides substantially as therein set forth and allege that said subparagraphs contain changes and omissions material to a correct and proper interpretation of Settlement Agreement and prejudicial to the interests of defendants in this Action, as appears from an examination of said Settlement Agreement.

(a) Answering subparagraph (a), defendants admit allegation in subparagraph (a) subject to the omission of what the Settlement Agreement provides as to stockholders' consent being required as a condition thereto, and defendants allege that the consent of stockholders was given on condition that old securities would be immediately exchanged for new after voting the merger.

(b) Defendants admit allegation in subparagraph (b) subject to provisions in Settlement Agreement which are omitted if same are material.

(c) Answering subparagraph (c), defendants deny that Settlement Agreement in substance provides as alleged therein and defendants allege that said subparagraph (c) omits the reference contained in Settlement Agreement to Paragraphs B and C of said Settlement Agreement, which said Paragraphs B and C deal with Reorganization expenses which are to be paid in cash, and Reorganization expenses which are to be paid in 30-year Notes; and defendants allege that such distinction is a necessary part of what the Settlement Agreement provides in reference to the payment of such Expenses.

(d) Defendants admit matters contained in subparagraph (d).

(e) Defendants admit matters contained in subparagraph (e).

(f) Answering subparagraph (f), defendants deny the allegation and allege that a condition, which is set forth in said Settlement Agreement to wit, that the consent of the Pioche Mines Company stockholders must be secured, is omitted, Defend-

ants allege that the words omitted are material and a necessary part of the Agreement.

(g) Answering subparagraph (g), defendants deny that Settlement Agreement substantially provides as set forth in subparagraph (g) and allege that Settlement Agreement provides that All of the parties to said Settlement Agreement have agreed to use their best efforts to obtain cash for Preference Notes, and allege that the word All is omitted and that said word All is material and a necessary part of said Agreement.

(h) Answering subparagraph (h), Defendants deny that the Settlement Agreement substantially provides as set forth in (h) and allege that matters contained therein are correctly set forth in Clause VII of Settlement Agreement, copy of which is filed as Exhibit A with Plaintiffs' Supplemental Complaint, and defendants specifically allege that essential parts of the Agreement are omitted, which are material and necessary and that such omissions change the intent and meaning of the Agreement, to wit, the provision that such arrangement or settlement so negotiated shall be binding upon the Debenture-holders who have signed the Agreement, or deposited their debentures thereunder, when approved by the holders of a majority of the outstanding Debentures, and also is omitted the provision that Debenture-Holders' Committee warrants, by its signature thereto, that it has obtained the authority to bind a majority of the deposited Debentures.

(i) Answering subparagraph (i), defendants

deny that Settlement Agreement provides substantially as set forth in (i) and allege that said Settlement Agreement provides as set forth in said Settlement Agreement, in Paragraph VIII thereof, copy of which is filed as "Exhibit A" with Plaintiffs' Supplemental Complaint.

And Defendants specifically deny allegation set forth in subparagraph (i) that Settlement Agreement provides that Janney and Baker agreed to sign endorsements to the Settlement Agreement, and allege that obtaining the consent of a majority of the Boston Creditors is a necessary condition to the signing of said endorsement by Baker, and obtaining the consent of a majority of the stockholders is a necessary condition to such signing by Janney; and further deny the allegation that these two gentlemen, Janney and Baker, agree to obtain the consent of a majority of the Boston Creditors and of the stockholders, but on the contrary agreed only to use their best efforts and then only after the Debenture-holders, as represented by Debenture-Holders' Committee, had become committed to the Settlement. Defendants further allege that the foregoing changes are material and alter the meaning of Settlement Agreement.

Answering subparagraph (j), defendants deny that the Settlement Agreement provides as alleged and allege that Settlement Agreement, copy of which is filed as Plaintiffs' "Exhibit A", sets forth in Clause IX thereof what the Agreement provides.

Answering subparagraph (k), defendants admit allegation therein but allege that the Plaintiffs have

omitted a material portion of Paragraph X in that such representative is to be selected by a method of selection hereafter to be agreed upon.

Answering subparagraph (l), defendants admit that provision is made in Settlement Agreement for a reorganization, but allege that Clause V of said Agreement provides that it is immaterial whether this is accomplished through reorganization, or a statutory merger, and allege that the method of statutory merger was selected by the parties as set forth in the Merger Agreement, form of which was approved by Debenture-Holders' Committee on or about December 29, 1942, and was approved by Stockholders' Meetings in December, 1943; and allege that said selection of plan for statutory merger, in preference to plan for reorganization, substantially modifies the procedure in carrying out the terms of Settlement Agreement, which procedure must conform to the Nevada statute, which provides that the titles to the properties of the Merged Companies pass automatically as soon as the Stockholders' Meetings of the merging companies vote approval to the Merger Agreement and the necessary papers are filed with the Secretary of State of Nevada, and Defendants allege that after such vote and filing, all the obligations of all parties to such Settlement Agreement become definite and binding legal obligations.

3. Answering Paragraph III, defendants admit there has been deposited with plaintiff, Fidelity-Philadelphia Trust Company, Five Hundred Ninety-seven Thousand Six Hundred ($597,600.00)

Dollars of Debentures (together with scrip and coupons appertaining thereto) comprising all of the debentures on the list of the Debenture-Holders' Committee, referred to in Supplemental Complaint.

Defendants deny that Debenture-Holders' Committee, in accordance with the said agreement, has used its best efforts to obtain the consent to the plan of reorganization of all of the Debenture-holders who had not deposited their Debentures with Fidelity prior to the execution of the Settlement Agreement, and allege that Debenture-Holders' Committee, contrary to said Agreement, failed to use their best efforts to obtain the consent of said Debenture-Holders but on the contrary made use of such non-deposited Debenture-Holders who conspired with them to defeat, deter and delay the Settlement and Merger, and said Debenture-Holders' Committee and Fidelity repeatedly refused, failed and neglected to give necessary information required by Stockholders' Meeting in reference to said non-deposited debentures and withheld such information contrary to their obligations in reference thereto.

Further answering Paragraph III, defendants admit that there remain debentures in the amount of Eighty-nine Thousand Seven Hundred ($89,700.00) Dollars not represented by, or associated with, Debenture-Holders' Committee, in addition to Debentures deposited with Fidelity, but deny that such $89,700.00 of Debentures have not been deposited under the Agreement or are still outstanding, and allege that Seventy Thousand ($70,000.00)

Dollars thereof which were subject to cancellation upon payment by defendant Consolidated Company are now cancelled by due resolution of the Board of Directors of the Consolidated Company, and such cancellation noted on the books of said Company, and debentures are now in the possession of Consolidated Company, and that the balance, Nineteen Thousand Seven Hundred ($19,700.00) Dollars—excepting Twelve Hundred Fifty ($1,250.00) Dollars thereof, the holders of which cannot be located—were represented at the Stockholders' Meeting, with authority duly given to exchange old debentures for new bonds upon consummation of Merger, and allege that such exchange was effected at Directors' Meetings held to consummate the Settlement, and that the old debentures were duly cancelled upon the books of Defendant Company, and are now in the possession of the Consolidated Company, leaving said Twelve Hundred Fifty ($1,250.00) Dollars of old Debentures remaining outstanding or to be paid in cash; and allege that defendants were not obligated under Settlement Agreement or otherwise to obtain consent of said Debenture-Holders or any of them, and that the surrender of such debentures was not necessary under the Settlement Agreement as a condition to completing Settlement and Merger.

Defendants admit that proxies were obtained by Debenture-Holders' Committee from the stockholders who were the owners of about 190,000 shares of stock, but allege that such proxies were not general proxies as is customary but said proxies were limited to the sole power of voting approval of

Merger and Settlement Agreements and did not permit representatives of said stockholders to vote on any measure, method or procedure which became necessary or advisable to facilitate or make effective said plan of Merger; and defendants allege that Fidelity and Debenture-Holders created obstacles to such plan of Merger.

Defendants further specifically deny that the Debenture-Holders' Committee has performed each and all of the obligations undertaken by it under the Settlement Agreement.

4. Answering Paragraph IV, defendants admit that Six Hundred Eighty-seven Thousand Three Hundred Dollars ($687,300.00) of Debentures were certified by Fidelity as alleged, but deny that said amount of Debentures remain outstanding; and defendants allege that Five Hundred Ninety Thousand Eight Hundred Dollars ($590,800.00) thereof have been paid, and that Seventy Thousand ($70,000.00) Dollars thereof pledged as collateral security for notes have been cancelled and which debentures also have now been cancelled as hereinbefore set forth, and that Twenty-five Thousand Two Hundred Fifty ($25,250.00) Dollars thereof, authorized to be pledged as collateral security remain to be cancalled on payment of Two Thousand Dollars ($2,000.00) Note, held by E. W. Clark & Company, to be paid from the sale of Preference Notes and not otherwise, leaving One Thousand Two Hundred Fifty ($1,250.00) Dollars Debentures which remain to be paid.

Defendants admit that Five Hundred Ninety Seven Thousand Six Hundred ($597,600.00) Dollars

Debentures have been deposited with Fidelity but have not sufficient knowledge or information upon which to base a belief as to whether all, or how many, of these Debentures were deposited under the Debenture-Holders' Agreement, but allege that after Settlement Agreement was signed by the Debenture-Holders' Committee all debentures whose representatives have signed the Settlement Agreement were held subject to its provisions.

5. Answering Paragraph V of said Supplemental Complaint, defendants admit that on or about November 22, 1943, Fidelity requisitioned Pioche Mines Consolidated, Inc., the surviving company, for Five Hundred Eighty-two Thousand Three Hundred Fifty ($582,350.00) Dollars of Income Bonds and One Million Seventy-five Thousand Eight Hundred Ninety-one (1,075,891) shares of Common Stock for delivery to holders of its non-negotiable receipts, giving the names and addresses in which such bonds and shares should be issued. And Defendants allege that there was no obligation at any time to deliver said Income Bonds to Fidelity by Pioche Mines Consolidated, Inc., the surviving company, under said Settlement Agreement, said Merger Agreement or otherwise.

Defendants deny that defendant Consolidated requested from Fidelity a requisition as alleged; and allege that Defendants sent a request to Fidelity for a list setting forth names, and addresses, of the Debenture-holders who were committed to terms of Settlement Agreement and obligated to exchange old securities for new upon consummation of Mer-

ger, and allege such a list of names, and addresses, was necessary in order to register the Income Bonds, which under terms of Merger Agreement were required to be registered, and that such new bonds could not be issued and registered without such names, and addresses.

Defendants admit that on or about the 27th day of December, 1943, Pioche Mines Company and Nevada Volcano Mines Company duly were merged into Pioche Mines Consolidated, Inc., now the surviving company, by a Merger Agreement duly authorized, certified and filed in the office of the Secretary of State, of the State of Nevada, as shown by Certificate thereof attached to said Supplemental Complaint, but defendants allege that said Merger Agreement was so ratified by Stockholders' Meetings of the merged Companies only after assurances by Debenture-Holders' Committee, and Fidelity, were given to the said Meetings, representing that all of the Debenture-holders on the list furnished by Fidelity had given their assent to the terms of Settlement Agreement.

Defendants admit that on or about the 24th day of April, 1944, Pioche Mines Consolidated, Inc., the surviving company, transmitted to Fidelity Five Hundred Thirty-nine Thousand Eight Hundred ($539,800.00) Dollars of Income Bonds and One Million Five Thousand Seven Hundred Thirty-six (1,005,766) shares of Capital Stock of Pioche Mines Consolidated, Inc., the surviving company, which Income Bonds were registered in the respective names of the parties on Fidelity's list.

Defendants admit that Fidelity has not received from Pioche Mines Consolidated, Inc., the surviving company, certain Income Bonds and Common Stock listed in its request to be issued in the following names and amounts:

> Henry G. Brooks—Two Thousand Five Hundred ($2,500.00) Dollars of Income Bonds; Four Thousand One Hundred Twenty-five (4,125) shares of Common Stock;
>
> Fidelity - Philadelphia Trust Co. — Fifty ($50.00) Dollars of Income Bonds, no shares of Common Stock.
>
> E. W. Clark & Co.—Forty Thousand ($40,000.00) Dollars of Income Bonds, Sixty-six Thousand (66,000) shares of Common Stock.

but defendants deny that at any time there was, or now is, any obligation upon Pioche Mines Consolidated, Inc., the surviving company, either under said Settlement Agreement, said Merger Agreement or otherwise to deliver said Income Bonds, or any of them, to Fidelity.

And further answering Paragraph V, Defendants have not sufficient knowledge, or information, upon which to base a belief as to the allegation that Forty Thousand ($40,000.00) Dollars of Debentures, listed on Fidelity's request in the name of E. W. Clark & Company, are represented by corresponding face-value of Fidelity's non-negotiable receipts outstanding in the name of Drexel & Company, or that Fidelity has been requested by Drexel & Company to cause said new securities to be listed in the

name of E. W. Clark & Company; but defendants allege that an issue of $40,000 of Income Bonds proposed to be issued to E. W. Clark & Co. had been the subject of much correspondence between Defendant company and Fidelity, and that replies from Fidelity to such correspondence with reference to said $40,000.00 Debentures were ambiguous, evasive and indefinite, and Defendants further allege that had said $40,000.00 of Income Bonds been issued to E. W. Clark & Company as requested by Fidelity an over-issue of Income Bonds would have resulted, and allege that requisition of Fidelity was lacking in necessary details and particulars to enable Defendant company's Directors to determine where to locate the error in Fidelity's figures that would have resulted in such an over-issue.

And defendants allege that Fidelity failed to facilitate consummation of the Merger and Settlement by requiring that the figures in their requisition to Defendant Company be based on an audit of Debenture Account as is customary in such transactions; and defendants allege that the Debenture Account was kept in Philadelphia by Percy H. Clark, party to Settlement Agreement and formerly attorney for Defendant Company, and that said Clark has never furnished an audit of said Debenture Account, and allege that defendant Company made a request for such an audit of Debenture Account to Barrow Wade & Guthrie, Certified Public Accountants, while they were auditing defendant Company's books for the Debenture Holders' Committee and such request was ignored.

And further answering Paragraph V, defendants admit that on or about April 24, 1944, Fidelity received from Pioche Mines Consolidated, Inc., Thirty-five Thousand ($35,000.00) Dollars of Income Notes, registered in its name, for the account of the attorneys for Fidelity-Philadelphia Trust Company and the Debenture Holders' Committee.

Further answering allegation as to $2,500.00 of Income Bonds of Henry G. Brooks, defendants admit that said Income Bonds, and also Forty-one Hundred Twenty-five (4,125) shares of Common Stock, in the name of Henry G. Brooks, have not been sent to Fidelity, and allege that said Henry G. Brooks, together with Lawrence R. Lee and Theodore E. Brown, are Intervenors in a certain Complaint in Intervention filed in this action, in which Complaint they seek to have Debenture-Holders' Agreement of February 1, 1939, found and decreed to be void and of no force and effect and that as a consequence of and in conformity with said Complaint in Intervention and the jurisdiction of this Court thereof, defendants tender herewith said Twenty-five Hundred ($2,500.00) Dollars of Income Bonds and Forty-one Hundred and Twenty-five (4,125) shares of Common Stock registered in the name of Henry G. Brooks to be disposed of in accordance with the decree and judgment of this Court.

Defendants admit that Fifty ($50.00) Dollars of Income Bonds are due to Fidelity, but allege that no bond denomination of Fifty ($50.00) Dollars is provided for in the Merger Agreement, and as a

consequence thereof herewith offer to pay Fidelity Fifty ($50.00) Dollars in cash or a bond specially denominated in the sum of Fifty ($50.00) Dollars, whichever may be decreed by the Court herein.

6. Answering Paragraph VI of Supplemental Complaint:

Defendants deny that Fidelity holds Debentures, scrip and coupons as Depositary under Debenture-Holders' Agreement in any respect in which said Debenture-Holders' Agreement conflicts with the Settlement Agreement, and Defendants allege that Settlement Agreement in Paragraph I-D-2 thereof provides in substance that the certificate of stock, sent to Fidelity, together with the issue of Income Bonds provided in 1-A, shall discharge all claims of the Debenture-Holders for both principal and interest, and defendants allege that the Settlement Agreement provides in substance in Clause VII, that said Settlement Agreement, when approved by holders of a majority of outstanding Debentures, shall be binding upon the holders of Debentures and scrip who have signed the Debenture-Holders' Agreement and deposited Debentures thereunder, and that said Debenture-Holders' Agreement empowers the Debenture-Holders' Committee to negotiate with defendants an arrangement in the nature of a reorganization or settlement for the purpose of avoiding or terminating litigation, and that such arrangement, or settlement, so negotiated shall be binding upon the holders of Debentures and Scrip who shall have signed the Agreement or deposited their Debentures thereunder when approved by a

majority of the outstanding Debentures, and that the Debenture-Holders' Committee warrants, by its signature thereto, that it has obtained the authority to bind the deposited Debentures by the authority of a majority thereof. And defendants allege that upon the signature of Debenture-Holders' Committee to Settlement Agreement containing the foregoing provision, Debenture-Holders became obligated to the terms of Settlement Agreement after which their Debentures were held subject to the terms of said Settlement Agreement.

Defendants allege that as relates to Income Bonds and Income Notes and shares of Stock delivered to Fidelity by defendant Consolidated, the delivery of same to Fidelity was with the intent and purpose of carrying into effect the provisions of the Settlement Agreement and not otherwise. Defendants allege that such delivery was requisitioned or requested by Fidelity and by Debenture-Holders' Committee, and allege there was no provision in the Settlement Agreement or any other Agreement which calls for the delivery to Fidelity of the Income Bonds, but only to deliver to them the shares of Stock and $35,000 of Income Notes to be paid to attorneys for their services.

Defendants allege that Fidelity was without lawful right or authority to hold said Income Bonds except for prompt delivery thereof to Debenture-Holders' and had no authority to hold possession thereof, and allege that Fidelity, failing to deliver said Income Bonds, was obligated to return same

to defendant Consolidated Company for such action in the premises as they might be advised.

Defendants deny that Debenture-Holders' Agreement is a part of Settlement Agreement, except for the purpose of establishing the authority of Debenture-Holders' Committee in the execution of said Settlement Agreement and by the terms of Settlement Agreement is only made a part of said agreement by reference.

And defendants deny the allegation that because of a provision in Debenture-Holders' Agreement Fidelity is unable to surrender the deposited Debentures for cancellation, and to distribute the Income Bonds and Stock until Defendants perform remaining obligations, if any, imposed upon them by the terms of Settlement Agreement; and deny that they have called upon Fidelity to surrender said deposited Debentures for cancellation; and allege that said debentures are not and never have been secured by lien or mortgage and that they are merely Debenture Notes and that they became null and void and of no effect immediately upon delivery to Fidelity for account of holders of the non-negotiable receipts of the new Income Bonds and Income Notes as provided for in Settlement Agreement and said Debentures were thereby paid and discharged and should be cancelled.

7. Defendants deny all matters as alleged in Paragraph VII excepting defendants admit that at one time Fidelity offered to discontinue the above-entitled suit, and allege that the discontinuance of said suit required the performance of other acts

provided for in the Settlement Agreement on the part of Fidelity and Debenture-Holders' Committee which they had failed and refused, and still fail and refuse to perform. Defendants specifically deny that the order of carrying out the provisions of settlement is as alleged in Paragraph VII.

8. Defendants deny allegation in Paragraph VIII and defendants further specifically deny that the defendants, or any of them, or Pioche Mines Consolidated, Inc., the surviving company, are obligated under said Settlement Agreement to deliver said debentures in the amount of Eighty-nine Thousand Seven Hundred ($89,700.00) Dollars (which as already set forth in Paragraph 3 have been fully discharged, excepting $1,250.00 thereof), to Fidelity for cancellation; and defendants further deny that performance by the parties of all of the several provisions of the Settlement Agreement is a condition-precedent to discontinuance of said suit.

9. Answering Paragraph IX, Defendants deny that Clarence E. Miller and Edward C. Dale, Plaintiffs, signed proxies to be voted at Stockholders' Meeting of Pioche Mines Consolidated, called for July 15, 1943, except limited proxies which did not empower proxy-holders to take part in the vote of Stockholders' Meetings held from July 15th down to December 1943, wherein said Meetings attempted to carry out Settlement Agreement and remove the obstructions placed in the way of Stockholders voting their approval of Settlement and Merger Agreements, as elsewhere set forth in this Answer, said

proxies being limited solely to voting on approval of said Agreements.

And defendants deny any knowledge or information thereof sufficient to form a belief that Clarence E. Miller and Edward C. Dale co-plaintiffs will join in discontinuance of said suit and therefore deny the same.

And defendants deny that the plan finally selected under Settlement was for a reorganization as alleged, and allege such plan was for a Statutory Merger in accordance with the detailed provisions of Nevada law.

10. Answering Paragraph X, defendants deny generally and specifically that they refused to arrange for Closing Settlement or to take part in such settlement, and allege that the Stockholders' Meeting which was required to be held under Nevada law for the ratification of said Merger and Settlement Agreements was called for that purpose for July 15, 1943, and allege that said Meeting was extended with frequent adjournments through December, 1943, and repeatedly attempted to complete the arrangements of settlement necessary for voting the approval of Settlement and Merger Agreements, and that Directors' Meetings from February to May, 1944, were held in continuous session for the purpose of consummating the Settlement and Merger Agreements; and defendants allege that Fidelity and Debenture-Holders, represented by Debenture-Holders' Committee in disregard of the intent of Paragraph X of Settlement Agreement, failed to be represented at Meetings of said Board

of Directors though they were repeatedly requested and urged to have their elected representative, or some other representative, present at said meetings and allege that they neglected and refused so to do, and their representatives at Stockholders' Meeting attended with limited proxies and refused to take part in the efforts for closing, and that otherwise Fidelity and Debenture-Holders' Committee obstructed the proceedings lawfully held by Stockholders and Directors for the purpose of consummating the Settlement and Merger Agreements, and delayed the consummation of said Settlement and Merger by evasive, inaccurate and confusing answers to questions asked by Stockholders' Meetings and Directors' Meetings and otherwise deliberately and intentionally delayed, obstructed and confused the necessary steps to the consummation of said Agreements.

And defendants specifically allege that Settlement Agreement calls for no other arrangement for a Closing Settlement than the authority conferred by the laws of Nevada for corporate action, to wit, Stockholders' and Directors' Meetings as aforesaid, and allege that no other meetings were necessary for carrying into effect the provisions of Settlement Agreement, and allege that Settlement Agreement was signed by the Defendants and other creditors on the condition and with the understanding that no further negotiations were required.

11. Answering Paragraph XI, subparagraph (a), defendants deny the allegation that Janney and Baker secured consents of Directors as alleged, and

allege that Janney and Baker arranged for a meeting to be called of the Directors of Pioche Mines Consolidated and Pioche Mines Company and Nevada Volcano Mine Co. and submitted the plan of Settlement and Merger to such Meetings for their consideration. Defendants admit that said companies have duly executed the Settlement Agreement, and admit that Janney and Baker secured powers of attorney from the holders of all Debentures outstanding and not deposited with Fidelity, excepting $1,250.00 elsewhere mentioned, authorizing Baker to accept the new Income Bonds in exchange for their old Debentures and to represent them at Stockholders' Meetings held for the purpose of consummation of Settlement and Merger, and have secured powers of attorney from other creditors and others.

(b) Answering subparagraph (b), defendants deny the allegation that they caused Pioche Mines Company and Nevada Volcano Mines Company to be merged into Pioche Mines Consolidated, Inc., but admit that stockholders' Meetings of said companies did vote to merge in accordance with terms of Settlement and Merger Agreements and allege that said vote, approving said Merger was secured by representations of the Debenture-Holders' Committee and Fidelity, that all of the Debentures on Fidelity's list were committed to the Settlement Agreement, and that the old Debentures would be exchanged for new Income Bonds immediately upon voting merger and filing required papers with Secretary of State of Nevada.

(c) Answering subparagraph (c), defendants admit the delivery to Fidelity by defendant Pioche Mines Consolidated of Five Hundred Thirty-nine Thousand Eight Hundred ($539,800.00) Dollars of its Income Bonds, and One Million Five Thousand Seven Hundred Sixty-six (1,005,766) shares of its Common Stock.

(d) Answering subparagraph (d) thereof, defendants admit the delivery to Fidelity of Thirty-five Thousand ($35,000.00) Dollars of Income Notes to cover attorneys' fees of Fidelity and Debenture-Holders' Committee.

12. Answering Paragraph XII, of Supplemental Complaint, Defendants deny, generally and specifically, that the Defendants or any of them, and/or John Janney or Richard K. Baker in any or all capacities in which they, or either of them, are parties to said Settlement Agreement, have failed or neglected, or continue to fail or neglect, to perform said Settlement Agreement in the particulars, or any of them, specified in said Paragraph XII, or in any other particular, except insofar as Fidelity and the Debenture-Holders represented by Debenture-Holders' Committee have prevented the consummation of said Settlement Agreement, as herein elsewhere set forth.

(a) Answering Paragraph XII, subparagraph (a), defendants specifically deny that they have failed and neglected to perform any agreement to deliver to Fidelity Eighty-nine Thousand Seven Hundred ($89,700.00) Dollars of Debentures as set forth in Paragraph 8 of this Answer, and deny that

there is any obligation to make such delivery, and further deny that they have failed or neglected to perform said agreement in not delivering to Fidelity all or any part of the shares of Stock being held for any Debentures which remain outstanding. Defendants allege that upon an audit of Debenture Account, or upon a proper accounting with Fidelity, and on proper demand, Defendant Consolidated Company is ready and willing to make delivery of Income Bonds together with the accompanying shares of stock in exchange for any Debentures that Fidelity is authorized to represent. Defendants allege that there is a balance of Seventy Thousand One Hundred Twenty-five (70,125) reclassified shares of Stock being held, which balance would accompany Forty-two Thousand Five Hundred Fifty ($42,550.00) Dollars of Income Bonds, and that said bonds have been withheld for reasons set forth under Paragraph V of this Answer.

(b) Answering Paragraph XII, subparagraph (b), defendants admit that they have not issued and delivered Forty-two Thousand Five Hundred Fifty ($42,550.00) Dollars of new Income Bonds and Stock to be distributed to the holders of Forty-two Thousand Five Hundred Fifty ($42,550.00) Dollars of Fidelity's non-negotiable receipts, but deny there is any failure or neglect to perform Settlement Agreement by reason thereof, and defendants herein reallege Paragraph V of this Answer with the same force and effect as if again fully set forth herein, together with their admissions, denials, allegations and tenders relative to said Forty-two Thousand

Five Hundred Fifty ($42,550.00) Dollars of Debentures and contained in said Paragraph V hereof.

(c) Answering subparagraph (c), defendants deny that there is any failure on their part, or any neglect, to perform Settlement Agreement in that they have not paid cash to Fidelity for account of parties entitled thereto in amount sufficient to cover reasonable reorganization expenses, and defendants allege that the cash for the payment of Reorganization expenses to be paid in cash, is specifically provided for in Settlement Agreement, Clause VI, to be obtained from the sale of Preference Notes, under which all parties have agreed to use their best efforts to obtain such cash; and defendants allege that Fidelity and Debenture-Holders have failed, refused and neglected to comply with such provision of said Contract, and they have obstructed and prevented defendant Consolidated Company from providing such cash from the sale of Preference Notes by refusing to distribute the new securities to Debenture-Holders, and in other ways have created a cloud upon the Preference feature provided in Settlement Agreement for the Preference Notes; and defendants further allege that but for such delays and obstructions on the part of Fidelity and Debenture-Holders, defendant Pioche Mines Consolidated could have sold said Preference Notes provided for in Settlement Agreement.

(d) Answering Paragraph XII, subparagraph (d), defendants deny they have failed to perform the Settlement Agreement as therein alleged, and allege that defendant Consolidated Company is

ready, and willing, to deliver upon proper demand, any Income Bonds, Income Notes and/or Stock, to any parties entitled to receive same, and defendants further allege that upon the sale of Preference Notes they are ready and willing to pay any obligations, required to be paid in cash, under Settlement Agreement, and further allege that such sale of Preference Notes and all other matters that remain to be performed under said Settlement have been prevented by the misconduct of Fidelity and Debenture-Holders represented by Debenture-Holders' Committee as elsewhere alleged in this Answer.

(e) Answering Paragraph XII, subparagraph (e), defendants admit said note of Two Thousand ($2,000.00) Dollars to E. W. Clark & Company has not been paid by Pioche Mines Consolidated, but allege they are not under any obligation so to do under Settlement Agreement until after sale of Preference Notes, provided for in Clause VI of said Agreement, which sale the misconduct of Fidelity and Debenture-Holders' Committee, as elsewhere set forth in this Answer, has prevented.

And defendants deny that Forty Thousand ($40,000.00) Dollars of non-negotiable receipts for Debentures is lawfully held by E. W. Clark & Co. as collateral to said Two Thousand ($2,000.00) Dollar note, and allege that said $40,000.00 of Debenture was deposited against said loan, (in original amount of $4,000.00), with E. W. Clark & Co. as collateral without authority except to the extent of $25,250.00 of said debentures, by Percy H. Clark who was attorney for E. W. Clark & Co. and also attorney for

defendant Consolidated Company and allege that the authority of said Percy H. Clark to use debentures as collateral was limited to debentures not paid for. Defendants allege that $14,750.00 of said $40,000.00 of debentures was not authorized to be so used and that said $14,750.00 of Debentures had been paid for by Lawrence R. Lee and Theo E. Brown who are intervenors, along with Henry G. Brooks, in this action.

And Defendants deny the allegation that no Income Bonds are provided to be issued to the holder of said $40,000.00 of said non-negotiable receipt and allege that $14,750.00 of new Income Bonds and accompanying Stock are required to be issued to Messrs. Lee and Brown under Settlement Agreement, and have been issued, and hereby are tendered into this Court for such disposition as the Court may order to be made thereof.

And defendants allege that said Lee-Brown $14,750.00 of Income Bonds were intermingled with other bonds in Fidelity's request for One Hundred Sixteen Thousand ($116,000.00) Dollars of Income Bonds to be issued in the name of Fidelity; and defendants allege that the turning over by Percy H. Clark of said $14,750.00 of Lee-Brown Debentures to E. W. Clark & Company as collateral, and the subsequent intermingling by Fidelity of $14,750.00 Income Bonds with bonds requisitioned to be issued to them was intended to create, and did create, confusion in the debenture accounting which has added to the delay in consummation of Settlement Agreement.

And defendants further specifically deny that said $40,000.00 of Bonds, or any part thereof, are to be retired before, or contemporaneously with, the performance of other obligations as alleged; and further deny that there is anything in the Settlement Agreement which requires any bonds to be retired contemporaneously with the performance of any other obligation as alleged.

Answering allegation as to contemporaneous performance, defendants further allege that titles to properties of the several companies passed to the Merged Company, under Nevada law, immediately upon voting approval by the Stockholders of the Merged Company, and filing with Secretary of State the papers as required by said law, and that thereafter it became obligatory upon all other parties to perform their several obligations in the manner and in ways as provided in Settlement Agreement, and further allege that after said titles passed it immediately became necessary for the status of old Debentures to be made definite and clear so as to make practicable the sale of Preference Notes, as provided in Clause VI of Settlement Agreement.

(f) Answering Paragraph XII, subparagraph (f), defendants deny that they have not paid, or provided for, the expenses and reasonable fees for services of Fidelity as Trustee as alleged; and allege that sufficient Income Bonds and/or Income Notes have been provided to make payment of all such obligations as are payable in Bonds or Notes, and allege that cash obligations are provided for in Preference Notes later to be sold, and allege that

defendant Consolidated will pay any and all such claims that can be shown to be justly due as provided in said Settlement Agreement upon sale of said Preference Notes, and allege that in respect to fees to Trustee as Depositary, defendants allege that nothing is now due them thereon and that when said payments become due defendants are willing to pay such amounts as may be just and reasonable and as provided for in Settlement Agreement.

(g) Answering Paragraph XII, subparagraph (g), defendants deny any failure to issue Income Bonds, Income Notes and Preference Notes immediately after consummation of Merger as alleged, except insofar as Fidelity and their attorneys made it impossible to immediately issue said securities, but admit that there was a delay from December, 1943 to August, 1944 in issuance of said securities, and allege that such delay was due entirely to the actions of Fidelity and Debenture-Holders' Committee, and Percy H. Clark, attorney for Fidelity, and other attorneys for Fidelity, in that they sought by unilateral action, without consent or approval of Defendant Company, to have the Securities Exchange Commission make a ruling as to the legality of the issuance of said securities, on the ground that the Form of said bond and note was defective in omitting to state on the face of said Bond that the Trust Indenture Act had been complied with, and also on the ground that the issuance of said securities would be in violation of Trust Indenture Act and Securities Act; and defendants allege that Fidelity and Clark failed and refused, to furnish

Defendants with a copy of their statement of facts which they had submitted to the Securities Commission, and allege that after the aforesaid acts of Fidelity and Debenture-Holders, the President of defendant Company held conferences during June and July and part of August with their attorney in New York, and representatives of the Securities Exchange Commission, and allege that after such conferences, and at the suggestion of representatives of said Commission, defendant company prepared a statement of facts relating to said issue in a letter dated July 7, 1944, addressed to defendant company's attorney and that defendant company handed said letter to representatives of the Securities and Exchange Commission, along with an Opinion letter of defendant Company's attorney, dated July 11, 1944, which letters are hereto attached, and made a part hereof and marked Defendants' "Exhibits One" and "Two", respectively, with a request for a decision from the Securities and Exchange Commission on the application to such issue of the Securities Act and the Trust Indenture Act, which Fidelity and the Debenture-Holders' Committee claimed were violated, and defendants allege that defendant Pioche Mines Consolidated secured from the Securities Exchange Commission the Opinion Letter of their Legal Department, as set forth in their letter dated July 31, 1944, a copy of which is hereto attached and made a part hereof and marked "Defendants' Exhibit Three", to the effect that the Securities Act and Trust Indenture Act

were not involved as has been claimed by Fidelity and Debenture-Holders' Committee.

And defendants allege that they, and especially Pioche Mines Consolidated, used due diligence and made every effort to prevent such delay in the issuance of such securities, and allege that Stockholders' meeting of Consolidated Company then in session at Pioche, Nevada, for the purpose of voting the Merger, sent to Percy H. Clark and other attorneys for Fidelity a Form of proposed income note and income bond for criticism or approval, and that although repeated requests were made for a reply thereto no reply was received by the Stockholders' Meeting from Fidelity, or Clark, or their other attorneys with any criticism upon the Form of bond, or any suggestion relating to the need, on the face of the bond, of a statement that the Trust Indenture Act had been complied with, and allege that after a reasonable lapse of time the said income bonds and notes were printed in accordance with said Forms, as proposed, and were registered in the names on the list furnished defendant Company by Fidelity, and that said Income Bonds and accompanying Stock, as elsewhere set forth in this Answer, were sent to Fidelity on or about April 27, 1944.

And defendants further allege that after the Opinion of the Legal Department of said Securities and Exchange Commission was obtained, Fidelity in collusion and conspiracy with said Percy H. Clark and Debenture-Holders' Committee wrongfully continued to withhold the distribution of the new securities and still continue so to do, and allege that

Fidelity stated in a letter to defendant Company that upon the lapse of ten days they would make such distribution, and that Fidelity continued to fail to distribute said new Bonds after the lapse of said ten days, and defendants further allege that the actions of Fidelity and Percy H. Clark, their attorney, and the Debenture-Holders' Committee, as above alleged were deliberate, and intentional, and well calculated to hold up the distribution of said new securities and delay the consummation of Settlement Agreement.

And defendants further allege that in various and sundry other ways Fidelity, and Debenture-Holders' Committee, and Percy H. Clark have delayed the issuance of said Income Bonds, and Income Notes and Preference Notes, and that Fidelity and Debenture-Holders' Committee and Percy H. Clark completely failed, and refused, to cooperate with defendant Company in all matters relating thereto.

13. (a) Answering Paragraph XIII, subparagraph (a), defendants deny all matters in said paragraph contained, and in this respect allege that respective conveyances of all the said properties, including the mill site, were, at the time of the filing of plaintiffs' Supplemental Complaint, and now are, matters of record which should and could have been known to Fidelity and Debenture-Holders' Committee if they had attended Stockholders' and Directors' Meetings where said conveyances were offered or had they otherwise exercised reasonable diligence and good faith.

(b) Answering Paragraph XIII, subparagraph

(b), defendants deny, generally and specifically, all matters in said paragraph contained, and in this respect allege that the delivery of the Nevada Volcano Mines Company Stock was duly made by John Janney to Pioche Mines Consolidated, Inc., and that such delivery is a matter of the corporation's records, which should and could have been known to plaintiffs if they had exercised reasonable diligence and good faith. Defendants further allege that under Nevada law when the merger was consummated the assets of Volcano Mines Company became the property of Pioche Mines Consolidated, Inc., the surviving company, and the stock of Volcano Mines Company thereby became null and void and of no effect.

(c) Answering Paragraph XIII, subparagraph (c), defendants admit that they have not issued and delivered Thirty-five Thousand ($35,000.00) Dollars of Income Notes to the attorneys for defendants, Pioche Mines Consolidated, Inc., Pioche Mines Company and John Janney, including Clarence M. Hawkins. Delivery of said notes to defendants' attorneys is not a condition-precedent to consummation of the Settlement Agreement and defendants deny that defendant, Pioche Mines Consolidated, Inc., is obligated to Clarence M. Hawkins for any attorney's fees or at all, and allege that said Clarence M. Hawkins is not entitled to any part or portion of said Thirty-five Thousand ($35,000.00) Dollars of Income Notes.

(d) Answering Paragraph XIII, subparagraph (d), defendants deny all matters alleged, and allege

that by the terms of the Settlement Agreement said stock was to be exchanged at the office of defendant company and that the defendant Company has prepared said stock certificates for delivery in the names of persons entitled to same, and has delivered such of said stock as has been demanded, and is ready to deliver certificates for all remaining shares upon the demand of parties entitled thereto and surrender of the Certificate for their old Stock, or upon the completion of Settlement Agreement without such demand.

(e) Answering Paragraph XIII, subparagraph (e), defendants admit that Pioche Mines Consolidated, Inc., the surviving company has not issued and sold Preference Notes as alleged, but defendants again allege that the issuance and sale of said preference notes has been deterred, obstructed and prevented by the Acts and conduct of Debenture-Holders' Committee, Fidelity, and of Percy H. Clark, all as more fully set forth elsewhere in the Answer.

And answering allegation that Settlement Agreement provides that these Preference notes to the extent necessary will be taken by less than ten of the Company's stockholders, defendants deny that Settlement Agreement contains any such provision and allege that this statement is a part of the statement contained in defendants' "Exhibit 1", other important parts of which are omitted, the omission of which makes the statement inaccurate, and reference is made to Defendants' "Exhibit One" for a correct statement.

(f) Answering Paragraph XIII, subparagraph (f), defendants admit that no long term lease of the said properties has been obtained by the defendants but deny that Settlement Agreement provides that defendants shall obtain such long-term lease. Defendants further deny that they have failed to negotiate for a lease or to use their best efforts to obtain a lease under the terms of which an income would be assured to Merged Company, and allege that they have made such efforts, and allege that the efforts made were rendered impossible of accomplishment by the actions of Fidelity and Debenture-Holders' Committee as elsewhere set forth in this Answer, which delayed the merger and which deterred and obstructed the settlement. Defendants further allege that the acts, demands, threats and assertions of said Fidelity, and Clark, their attorney, and of Debenture-Holders' Committee, were intended to deter and prevent and did deter and prevent prospective lessors from giving serious consideration to a lease of said properties.

14. Answering Paragraph XIV, defendants admit as alleged in Paragraph XIV that the partial performance of Settlement Agreement by the parties has unalterably changed the relation of the parties to each other and to the enterprise, and allege that the said unalterably changed relations was caused by, and has resulted from, the actions of Fidelity and Debenture-Holders' Committee and Percy H. Clark, attorney for Fidelity and Debenture-Holders' Committee, who wilfully and wrongfully induced defendants, and particularly Defend-

ant Companies and Volcano Mines Company, to merge and thus convey the titles of their respective properties to the Merged Company, by giving assurances to said Merging Companies, in Stockholders' Meeting assembled, that all the Debentureholders on Fidelity's list had consented to Settlement Agreement and were obligated thereunder to exchange old securities for new immediately upon consummation of the Merger, thus inducing Stockholders' Meeting to believe, and they did believe, that on voting the Merger all Debentures on Fidelity's requisition list would be exchanged for the new Bonds without delay, and defendants further allege that Fidelity and Debenture-Holders' Committee so represented in bad faith and gave the Stockholders' Meeting to so believe and allege they had no intention, for themselves or on the part of Debentures they represented, of carrying out the contract of Settlement.

And defendants allege that after inducing defendants' Stockholders to vote the merger under the belief and with the representation as aforesaid, their subsequent actions, as herein elsewhere set forth—and especially the actions of Fidelity, Percy H. Clark and Debenture-Holders' Committee in working together to have the Securities Exchange Commission involved in their efforts to delay or defeat the Settlement—disclose that their intent was to make use of the contract of settlement as a means of causing the properties of Pioche Mines Company and of Nevada Volcano Mines Company to pass to defendant Consolidated Company under

Nevada Merger Statute, intending thereby to force upon defendants a position of disadvantage in future negotiations, and intending to force such future negotiations hoping thereby to gain further advantages to themselves from the fact that said Merged Companies had surrendered control of, and title to, the properties which were formerly held by said companies, and also for the purpose, and with the intention, of having Pioche Mines Consolidated, the Merged Company, acquire additional property back of the securities held by Plaintiffs and their associates, and allege that aforesaid parties also intended thereby to deprive the Emergency Creditors who were creditors of Pioche Mines Company of their very favorable credit position which they occupied before said Merger, in that said Creditors had first claim to the assets of said Pioche Mines Company, giving them complete and entire security for the payments of Cash Advances which they had made to said Pioche Mines Company, which advances are referred to in Settlement Agreement as Emergency Creditors.

15. Answering Paragraph XV, defendants admit that Messrs. Hartshorn & Walter were engaged by Pioche Consolidated to audit its books and accounts and that a member of the firm came to Pioche for that purpose, but deny that Plaintiffs and the Debenture-Holders' Committee furnished said auditors with necessary information requested by them, and allege that said auditors were unable to complete their auditors' report, or to make a satisfactory statement to the Stockholders' Meeting without in-

formation as to what the outstanding debts of the surviving company would be after the stockholders completed the Merger by voting approval thereof; and further allege that said auditors did request from Debenture-Holders' Committee definite information setting forth the amount of debentures in their group which were committed to the Settlement Agreement, and the amount of debentures which were not committed and would be outstanding and payable after the Merger was consummated, which information Debenture-Holders' Committee failed and refused to divulge to auditors as requested. Defendants allege that they are willing to furnish Plaintiffs with auditors' report of Hartshorn & Walter when said audit is completed.

16. Further answering, Defendants allege that Fidelity and the Debenture-Holders represented by Debenture-Holders' Committee and Percy H. Clark, attorney for Fidelity, and for Debenture-Holders have breached the Settlement Agreement and have failed, neglected and refused to carry out its provisions, and have failed and refused and neglected to cooperate with defendant Company in its effort to carry out said provisions and have failed to do those things necessary for the consummation of same but on the contrary have intentionally obstructed and delayed said settlement, and have, until now, deliberately and intentionally prevented the final consummation of Settlement Agreement.

17. Further answering, defendants allege that by reason of the delivery to Fidelity of Five Hundred Thirty-nine Thousand Eight Hundred Dollars

($539,800.00) of Debentures, and One Million Five Thousand Seven Hundred Sixty-six (1,005,766) shares of Stock, as set forth in Paragraph V of Supplemental Complaint, that Fidelity cannot maintain any claim or demand upon defendants so long as Fidelity, and the Debenture-Holders who have deposited their Debentures with Fidelity, refuse to have distributed the new securities provided for in Settlement Agreement to those rightfully entitled thereto and so long as they continue their efforts to confuse the status of the settlement, nor so long as they refuse to have cleared the cloud from the title to the Preference-feature of the Preference Notes provided for in Paragraph VI of said Settlement Agreement, to the end that prospective investors may safely invest in said Preference Notes without the threat of litigation to the Company issuing said notes, and plaintiff otherwise must carry out the provisions of Settlement Agreement as far as is necessary or proper to aid and facilitate the consummation of said Settlement.

18. That properties of the merged Company contain vast quantities of lead and zinc ores, which during recent years have commanded a bonus from the United States Government by reason of the strategic value of such materials in times of war. Since July 8, 1942, the date of the said Settlement Agreement, by reason of the failure of the Plaintiffs to carry out the terms of the Settlement Agreement, the merged Company has been unable to finance or lease or otherwise to develop said mines or take advantage of the bonus offered in respect thereto

by the Government, or to avail themselves of the assistance of the Reconstruction Finance Corporation, which was available to all mines having such strategic ores, and by reason thereof, said merged Company has been deprived of the profits which it otherwise would have obtained.

19. Defendants allege that prior to the consummation of the Merger of Pioche Mines Company and Nevada Volcano Mines Company into Pioche Mines Consolidated, on December 27, 1943, the two said companies were both Nevada corporations, managed by their respective Boards of Directors, they were each of them separate, integral organizations with no relation to Pioche Mines Consolidated, Inc. excepting that said Pioche Mines Consolidated, Inc. was the owner of stock in Pioche Mines Company and owned an equitable or beneficial interest in the Stock of Nevada Volcano Mines Company, held under a Trust for the benefit of certain Pioche Mines Company Stockholders as designated in the said Trust, and allege that both the Pioche Mines Company and Nevada Volcano Mines Company were in a position to operate the properties respectively owned by them in spite of the fact that said companies were not financed and needed financing, due to the policy adopted by the Government of the United States to aid and encourage such mining organizations as were able to produce lead or zinc or other strategic metals for the benefit of the war effort and allege that the Pioche Mines Company and Nevada Volcano Mines Company both had produced considerable quantities of lead ore and were

in a position to operate and develop further extensions of the same ore bodies which produced these ores, and could have met the requirements for receiving such government financial aid and assistance, and they could have qualified for premium payments allowed on production of strategic minerals.

Wherefore, defendants pray:

1. That plaintiffs' Supplemental Complaint be dismissed and denied with costs.

2. For such other and further relief as may be just, proper and equitable.

DWIGHT, HARRIS, KOEGEL
& CASKEY,
/s/ By RICHARD E. DWIGHT.

/s/ CRAVEN & BUSEY

[Endorsed]: Filed April 21, 1947.

[Title of District Court and Cause.]

NOTICE OF MOTION TO ADD PARTIES PLAINTIFF

To: Thatcher, Woodburn and Forman, Clark, Hebard and Spahr, and Plaintiffs Above Named:

Please Take Notice that defendants will bring the motion hereinafter made and stated in writing on for hearing before the above entitled Court in the Courtroom thereof in the United States Post Office, Carson City, Nevada, on the 2nd day of June, 1947,

at the hour of 10 o'clock, a.m. of said day or as soon thereafter as counsel can be heard:

For An Order of Court adding as parties plaintiff upon such terms as may be just the following:

1. Percy H. Clark and Albert P. Gerhard, as individuals.

2. Percy H. Clark and Albert P. Gerhard, representing the majority of the holders of deposited debenture bonds of the defendant, Pioche Mines Consolidated, Inc.

3. John Doe for Robert F. Holden, deceased.

And For An Order substituting the following party:

1. Richard Roe for E. Clarence Miller, now deceased, who died on.....

The foregoing Motions are made and based upon the ground and for the reasons fully stated in Defendants' Answer to the Supplemental Complaint and in Defendants' Counterclaim to the Supplemental Complaint on file herein.

Dated: This 17th day of April, 1947.

/s/ CRAVEN & BUSEY.
/s/ RICHARD E. DWIGHT.

[Endorsed]: Filed April 21, 1947.

[Title of District Court and Cause.]

MOTION FOR LEAVE TO FILE COUNTERCLAIM TO SUPPLEMENTAL COMPLAINT

Pioche Mines Consolidated, Inc., Pioche Mines Company, and John Janney move the Court for leave to file a Counterclaim to the Supplemental Complaint,

a copy of which is attached hereto as Exhibit "X" upon the ground that the transactions, occurrences and events stated therein have happened since the date of the Defendants' Amended Answer. The Counterclaim set forth in Exhibit "X" attached hereto arises out of the transaction and occurrence that is the subject matter of plaintiffs' claim set forth in their Supplemental Complaint on file herein and does not require for its adjudication the presence of third parties of whom the Court cannot acquire jurisdiction. It is in the interest of justice that all issues between plaintiffs and defendants be litigated in this action.

Dated: This.....day of....., A.D., 1947.

CRAVEN & BUSEY,
/s/ By DOUGLAS A. BUSEY.
DWIGHT, HARRIS, KOEGEL & CASKEY,
/s/ By RICHARD E. DWIGHT.
Attorneys for Defendants.

[Endorsed]: Filed April 21, 1947.

[Title of District Court and Cause.]

COUNTERCLAIMS TO SUPPLEMENTAL COMPLAINT FOR A FIRST CAUSE OF ACTION.

For a first cause of action by Defendants against Plaintiffs herein, and others associated with them and by way of Counterclaim:

1. Defendants reassert all the allegations and denials in the original Amended Answer and in the

Answer to the Supplemental Complaint so far as they are material or pertinent, to all intents and purposes as if herein set forth in full, and more particularly but without meaning to limit the foregoing, Defendants reallege and reassert the allegations contained in Paragraphs 18 to 33, inclusive, in said Amended Answer and in Paragraph Sixteen of Defendants' Answer to Supplemental Complaint as if fully herein set forth; and defendants allege that the neglect and refusal of Percy H. Clark, attorney for Fidelity, and the Debenture-holders as represented by the Debenture Holders' Committee and the neglect and refusal of Fidelity-Philadelphia Trust Company, plaintiff in this action, to carry out the provisions of settlement Agreement, as well as their obstruction of the efforts of the other parties in carrying out said Agreement, including various and sundry acts extending from the date of Settlement Agreement down to the present time, constitute a breach of contract and improper conduct; and include among other things, the following:

(a) Said Percy H. Clark and Robert F. Holden of Debenture-Holders' Committee obstructed and delayed obtaining the signature to the First Endorsement to Settlement Agreement, in that they failed and refused to respond to questions asked by the Boston Committee of Stockholders and Creditors at a meeting held for the purpose of authorizing its agent to sign said First Endorsement;

(b) Said Clark and Debenture-holders' Committee delayed and refused to use their best efforts or any efforts whatsoever to obtain the consent of un-

deposited debenture-holders to the Settlement Agreement, as provided in Paragraph VII thereof.

(c) Said Clark and Debenture-holders' Committee failed to secure, or to use any effort to secure, the consent of undeposited Debenture-holders by the time local meetings were held in August, 1942 of Stockholders' groups, who gave the consent of the majority of the Stockholders to the Second Endorsement on said Settlement Agreement, and failed to report the status of said undeposited Debenture-holders by the time of such meetings of local groups of stockholders; and said Clark and Debenture-holders' Committee failed to secure or make any effort to secure, the consents of the holders of such undeposited Debentures for the meetings in Pioche, Nevada of Boards of Directors of the several companies held to secure approval of said Settlement and Merger Agreements and failed to use their best efforts to secure such consents in time for the called Stockholders' Meeting held in Pioche, Nevada, on July 19th, 1943, and failed and refused to give Stockholders' Meetings definite information of the status of said undeposited Debenture-holders with reference to their being bound by said Settlement Agreement.

(d) Said Clark and Debenture-Holders' Committee refused and neglected to notify the officers of Pioche Mines Consolidated that the Committee had failed to obtain consents of the undeposited Debenture-holders to Settlement Agreement, and by reason of such action, Stockholders' Meeting was called for July 15, 1943 with the knowledge of Clark and said Debenture-holders' Committee to act upon proposed

Merger, upon the assumption and representation of said Clark and the Debenture-Holders' Committee that such consents had been secured and would be forthcoming in time for the proposed Stockholders' Meeting, and when the Meeting assembled it was found that said consents were not forthcoming and the status of said consents remained uncertain, and Stockholders' Meeting was adjourned from time to time until December 3, 1943, because of the failure and refusal of said Clark and the Debenture-Holders' Committee and Fidelity prior to that date to make the status of said debentures certain or to give definite assurance that all such Debenture-holders were committed to the Settlement Agreement as written, or to advise as to which of the Debenture-holders had refused to become committed to Settlement Agreement.

(e) Said Clark and Debenture-Holders' Committee and the Stockholders whom they represented, refused and neglected to attend the Stockholders' Meeting except by limited proxy, that prevented cooperation with the meeting in carrying out the Settlement Agreement, especially in connection with the obligations they were to perform as therein required.

(f) Said Clark and Debenture-holders' Committee delayed the approval of a Form for the Merger Agreement, provided for in Settlement Agreement, by insisting upon numerous and unnecessary conferences and by refusing to approve a Form for the Merger Agreement until December 29, 1942.

(g) Said Clark and Debenture-holders' Committee and Fidelity refused and failed and neglected to

approve or disapprove the form of the Income Bond required to be issued by the Merged Company immediately upon the consummation of Merger, a form of which was sent to attorneys for plaintiffs for their objections or approval at the direction of Stockholders' Meeting, and after Income Bonds had been printed according to said form filled-out in names according to Fidelity's list and sent to Fidelity for delivery, the form was objected to by Fidelity and Debenture-holders' Committee creating delay.

(h) Said Clark, the Debenture-holders' Committee and Fidelity delayed and obstructed the Settlement Agreement by filing with the Securities and Exchange Commission, legal objections to the issuance of the new securities, after Fidelity had received same, without authority of or consent from Pioche Mines Consolidated, as a result of which it took until July 31, 1944 to get a counter-legal opinion from the legal department of the Securities and Exchange Commission, to overcome such obstruction so created by Fidelity and Debenture-holders' Committee.

(i) And Fidelity caused their officers and their attorneys to work with said Debenture-holders' Committee and said Clark in various other ways in a joint effort to prevent, obstruct and delay the consummation of Settlement Agreement.

2. That Fidelity-Philadelphia Trust Company has failed and refused and neglected to perform certain of the terms of said Settlement Agreement on their part to be performed, in the following respects:

(a) By Fidelity refusing and delaying to make a definite reply or any proper reply to request made

them by Stockholders' Meeting then in session at Pioche, Nevada for a list of Debenture-holders represented by Fidelity who were committed to the Settlement Agreement as written and who were obligated to accept the new securities as provided under Settlement Agreement, as against those who were not committed and whose debentures would remain as a cash obligation of Merged Company.

(b) By Fidelity sending a list of Debenture-holders who had deposited their bonds with them, to said Stockholders' Meeting being held for the purpose of considering and acting upon proposed Merger, and accompanying said List with letter stating that the new proposed securities were not authorized to be issued to those on the list, thereby confusing said Stockholders' Meeting as to exact status of the Debenture-Holders on said list and delaying the vote of Stockholders' Meeting approving Merger.

(c) By Fidelity refusing to proceed with Settlement Agreement unless and until the payment of Seventy-five Hundred ($7500) Dollars was first made to them in cash, which payment the Settlement Agreement did not provide so to be made, and which demand the Stockholders' Meeting then in session could not meet without prior authorization by the auditors or Directors of Pioche Mines Consolidated, and Fidelity and Debenture-holders' Committee knew that cash was not available to said Defendant Company for said payment:

(d) By Fidelity refusing to affix the issuance stamps required by law to be affixed, to the stock to be delivered to depositing Debenture-holders or to

accept the guarantee of payment by the Bank of Pioche but demanding cash, thus creating another delay;

(e) By Fidelity refusing to acknowledge their obligation to distribute new securities sent them by Pioche Mines Consolidated, the Merged Company, and their refusal to tender same to Debenture Holders in exchange for old Debentures and report the result of such tender;

(f) By Fidelity having their Philadelphia general counsel give a written legal opinion, which their attorney Percy H. Clark submitted to the Securities and Exchange Commission, pursuading or attempting to pursuade said Commission to rule that the issue of new securities, which defendants had sent Fidelity under Settlement Agreement, was in violation of the Trust Indenture Act; and also by Fidelity attempting through their attorneys to secure an opinion from the Eastern Attorneys of Defendant Pioche Mines Consolidated to the effect that said issue of new securities was in violation of law, without joining with said Defendant Pioche Mines Consolidated as requested by said defendants to do in an agreed statement of facts relating thereto;

(g) By Fidelity still continuing to hold up the distribution of new securities after the Securities and Exchange Commission's Legal Department handed over a written opinion that the issue of the securities sent Fidelity under Settlement Agreement was legal, and that neither the Securities Act nor the Trust Indenture Act was violated by the form or by the issuance of said securities.

(h) By Fidelity creating an impasse in the progress of Settlement Agreement, and by working with Debenture-holders' Committee in actions which were intended to create such an impasse, they intended to create and did create a cloud upon the preference feature of the Preference Notes which rendered them unsalable, and by their threats not to perform said Agreement on their part until after the Settlement Agreement was fully consummated.

(i) By other communications to Defendants' attorneys attempting to complicate and delay consummation of the Settlement Agreement; and by various and sundry other acts of Fidelity's officers and attorneys in cooperation with Debenture-holders' Committee which confused, delayed and obstructed the the consummation of Settlement, and by such delay caused defendant Pioche Mines Consolidated to become financially embarrassed *an* incapable of meeting promptly taxes and other carrying charges and expenses,

For A Second Cause of Action

For further action by Defendants against Plaintiffs herein and others associated with them in the nature of counter-claim:

1. Defendants reassert all the allegations and denials in Defendants original Amended Answer to Plaintiffs' Complaint so far as they are material or pertinent to all intents and purposes as if herein set forth in full, and more particularly without meaning to limit the foregoing defendants reallege and reassert the allegations contained in paragraphs Eighteen, Nineteen, Twenty, Twenty-one, Twenty-two,

Twenty-three and Twenty-four, Twenty-six, Twenty-seven and Thirty-three in the said Amended Answer to the original Complaint in this action previously filed.

2. Defendants reassert all the allegations and denials in Defendants' Answer to Supplemental Complaint in this action as if herein fully set forth, and more particularly, without meaning to limit the foregoing, reallege Paragraphs Fourteen and Sixteen of said Defendants' Answer to Supplemental Complaint.

3. Defendants allege that Fidelity-Philadelphia Trust Company, Percy H. Clark, Debenture Holders Committee, Albert P. Gerhard, E. Clarence Miller, Edward C. Dale and Robert F. Holden unlawfully connived and conspired together, each with the others, for the specific purpose of preventing the consummation of the reorganization plan provided for in said Settlement Agreement.

4. Defendants allege that the formation of Debenture-holders' Committee by said Clark, his activity and the activity of said Debenture-holders' Committee in the solicitation of Debenture-holders' request for the institution of the suit, and the institution thereof, by Fidelity; the negotiation of the Settlement Agreement marked "Exhibit A", in bad faith and with intent not to carry out the terms thereof as more fully set forth in Defendants' Answer to Supplemental Complaint, and subsequent delay and obstruction in the execution of the terms of said Settlement Agreement by Fidelity, are all part of the scheme and conspiracy heretofore referred to, on the

part of said Fidelity, Clark and their associates, known and unknown, to hinder and make impossible the refinancing of the defendant Company necessary in order to rebuild its mill destroyed by fire in September, 1929 and thereby enable them to take over for the use and benefit of themselves and their said associates, known and unknown, the valuable properties of these defendants.

5. Defendants allege that the conspiracy herein alleged dates from the time of the Settlement Agreement and continues down to the present time and allege that said conspiracy is a part of this same conspiracy and a continuation of the same obstructionist tactics, conduct and acts of said conspirators fully set forth in Defendants' original Amended Answer on file herewith, and particularly as set forth in Paragraphs 18, 19, 20, 21, 22, 23, 24, 26, 27 and 33 of said Answer, to which reference is herein above made. That said Percy H. Clark was attorney for defendant, Pioche Mines Consolidated, Inc. from the date of its incorporation until January 26, 1939, was attorney for Pioche Mines Company during the same period of time, and in such position said Clark recommended and urged the reorganization of said Pioche Mines Company and the issuance of the Debentures which were to be subscribed by himself, his friends and their associates; and was Vice-President of Pioche Mines Consolidated, Inc. with special duties relating to the debenture accounts and transactions from January, 1929 to about February, 1940, and as such executed the original Trust Agreement between Fidelity Philadelphia Trust Company and defendant Pioche Mines

Consolidated, Inc.; and was one of the attorneys for E. W. Clark & Co. at the time he gave $40,000 of Company Debentures as collateral, without authority to deliver more than $25,500 thereof, to said E. W. Clark & Co. and thereby involved said Pioche Mines Consolidated in their Debenture accounting with certain Debenture subscribers, as set forth more fully in Defendants' Answer herein. Said Percy H. Clark is attorney for Fidelity Philadelphia Trust Company in the institution of this action, and is now such attorney, and said Percy H. Clark is now attorney for the said Debenture-holders' Committee, and has been ever since its formation, and is an individual member thereof, and was and is individually a party to the Settlement Agreement.

That the many and varied and inconsistent positions of Percy H. Clark are in violation of his original relation of fiduciary and position of trust with Defendants, Pioche Mines Consolidated, Inc. and Pioche Mines Company, and have better enabled Percy H. Clark to conspire with said Fidelity Philadelphia Trust Company and said other persons (known and unknown) to obstruct and prevent said reorganized corporation from carrying out and consummating such Settlement Agreement and the plan of reorganization provided for therein, and that said Percy H. Clark's conduct in such respect and that of said Conspirators has been wilfully and intentionally malicious and improper, and designed to greatly injure and damage said Defendants and said reorganized corporation.

6. And allege in pursuance of aforesaid Con-

spiracy that Fidelity and Clark, while under cross-examination in taking of depositions on June 6, 1942, induced the Defendants to enter into the Settlement Agreement; that Plaintiffs falsely and fraudulently represented that they intended to carry out the terms of said Agreement and that the Defendants relied upon said representations and did enter into said Settlement Agreement in good faith; but that said representations were false and intended to deceive, and in truth and fact Fidelity and Clark entered into said Settlement Agreement in bad faith, not intending to carry out its terms and intending merely thereby to further delay and harass the defendants in the development of the Merged Company's properties and procurement of necessary finances, and further intending to induce the Creditors of defendant Pioche Mines Company, of whom your co-defendant, John Janney, is one, to waive their security upon the assets of said Pioche Mines Company intending that plaintiffs might obtain for themselves equal standing in claims upon said assets; and allege it was also the intent of said conspirators to create complications between said merged Company and aforesaid creditors who were displaced in their rights to a preferred claim upon the assets of said Pioche Mines Company.

7. Defendants allege that it is a part of said conspiracy to contrive to use said Settlement Agreement as a means of getting the non-deposited debentures, which did not at first come in with the Clark group in their action, to combine with other debentures in making a solid block to be used in negotiations with

the Company in arriving at harsher terms of settlement Agreement, in disregard of terms agreed to as of June 8, 1942, and that plaintiffs had no intention of complying with terms of said settlement agreement but intended to refuse to go through with said agreement on one pretext or another making use of said agreement as a basis for conducting further negotiations and getting terms more in accordance with the objects of their conspiracy.

8. That it is a part of said conspiracy that the Defendant, Pioche Mines Consolidated, was to be coerced into making a lease of its properties and to have included in said lease the properties of Pioche Mines Company and Nevada Volcano Mines Company, and all properties on such terms and to such persons as suited the purpose of said conspiracy, and in the event said company was not successful in leasing its properties it was the intent of the aforesaid conspirators not to turn in their bonds and it was their intent to leave the Defendant Company in the position of having induced other creditors to turn in their obligations as a part of the merger and to take income notes therefor, thus depriving such other creditors, particularly the emergency creditors aforesaid of a favorable credit position which constituted a prior claim to the assets of the Pioche Mines Company, all as more fully set forth elsewhere in defendants' Answer, and it was the intent of said conspirators that the property was to be held in idleness while the mine workings deteriorated and caved in and became inaccessible, and timbers decayed, machinery

became obsolete, personnel and organization became discouraged and disbanded.

9. During the pendency of this action and ever since shortly after the filing of plaintiffs' complaint herein, the extensive properties, mining claims and patented claims of defendants, and of said merged corporation have been under levy of attachment issued herein, thereby preventing their development, operation and mining ever since the date of the said settlement agreement, to wit, July 8, 1942, and said development and operation of said properties and mining and patented claims have been prevented by said attachment and by the wrongful acts and conduct elsewhere set out in defendants' Answer. During such period of time the market value of strategic metals abounding in said properties, to wit, lead, zinc and copper, has been at an extremely high level. During such period of time, grants and allowances were made by the United States Government for the purpose of developing and blocking out ore bodies containing such strategic metals.

10. Defendants allege that the action of Fidelity, in failing and refusing to distribute the new Income Bonds and Stock to those entitled thereto, and the action of Fidelity Philadelphia Trust Company and of Debenture-Holders' Committee and the Debenture-holders they represent, in failing and refusing to complete the Settlement Agreement, and in failing to use their best efforts to remove the cloud to title and doubt of the preference-feature of the Preference Notes, which doubt had been raised by the improper conduct of Fidelity and Debenture-Holders' Commit-

tee as hereinbefore alleged, and their failure to comply with the terms of Settlement Agreement—and their action in delaying the distribution of the new securities by unilateral action with the Securities & Exchange Commission—and various other acts as more fully set forth in Defendants' Answer to Plaintiffs' Supplemental Complaint all caused doubts in the minds of prospective investors in the Preference Notes and all were done pursuant to said conspiracy.

11. Defendants allege that by the failure of Fidelity and the Debenture-Holders' Committee to consummate the Settlement Agreement on their part as therein provided, defendant Pioche Mines Company has been deprived of the control and ownership of its mining properties and patented mining claims and the right to enter same and take ores therefrom during the period of time from July 8, 1942 down to the present time, and have been prevented from producing strategic metals of lead and zinc for the benefit of the Government of the United States in its war emergency, and have been deprived of the benefit of the aid that would have been rendered to such effort by way of premiums and bonuses on metals produced, and aid from the Reconstruction Finance Corporation in financing such operation of said Pioche Mines Company properties. And allege that the said property of Pioche Mines Company borders on the south and west properties which have opened up and developed massive bodies of zinc, lead ores which are among the largest zinc-lead ore bodies in the western part of the United States, and that a large area of Pioche Mines Company property contains this same

geological structure which has produced said ore bodies.

12. Defendants allege that by the failure of Fidelity and the Debenture-Holders' Committee to consummate the Settlement Agreement on their part as therein provided, Nevada Volcano Mines Company has been deprived of the control and ownership of its mining properties and patented mining claims and the right to enter same and take ores therefrom during the period of time from July 8, 1942 down to the present time, and have been prevented from producing strategic metals of lead and zinc for the benefit of the Government of the United States in its war emergency, and have been deprived of the benefit of the aid that would have been rendered to such effort by way of premiums and bonuses on metals produced, and aid from the Reconstruction Finance Corporation in financing such operation of said Nevada Volcano Mines Company properties.

13. By reason of the wrongful acts and conduct and conspiracy of said conspirators, defendants and said reorganized corporation have been deprived of very large and substantial profits which otherwise would have accrued to them, all to their great damage in the sum in excess of Three Million Dollars ($3,000,000.00).

14. Percy H. Clark and Albert P. Gerhard, as individuals, and the successors or personal representative of Robert F. Holden, now deceased, are indispensable parties to this action and individual persons who ought to be parties if complete relief is to be accorded between those already parties.

Percy H. Clark and Albert P. Gerhard, representing a majority of the holders of deposited debenture bonds of defendant, Pioche Mines Consolidated, Inc., are indispensable parties necessary to fairly insure the adequate representation of debenture-holders of defendant, Pioche Mines Consolidated, Inc., who have deposited their debentures with Fidelity-Philadelphia Trust Company, the character of the right sought to be enforced for and against such debenture-holders being several and there being common questions of law and fact affecting the several rights of such debenture-holders, and common relief being sought for and against them. None of said persons have been made parties, but all of said persons are subject to the jurisdiction of the Court, duly having appeared personally in this action in their respective individual and class capacities, as aforesaid, by the filing herein of the aforesaid agreement or stipulation of settlement and by causing to be instituted as action set forth in a Supplemental Complaint to enforce the terms of said agreement or stipulation. Said persons otherwise to the extent they are Bond-holders, Stockholders or Creditors of defendants, Pioche Mines Consolidated, Inc., or Pioche Mines Company, all within the jurisdiction of this Court, and they are indispensable parties to this action and ought to be made parties thereto if complete relief is to be accorded between those already parties.

Wherefore, defendants pray:

1. That this Court enter its Order joining Percy H. Clark, Albert P. Gerhard and the successors

or personal representative of E. Clarence Miller and Robert F. Holden, with Fidelity-Philadelphia Trust Company and Edward C. Dale as individual plaintiffs herein, and that this Court enter its Order joining Percy H. Clark and Albert P. Gerhard as a plaintiff herein in their individual capacities and as representing a majority of the holders of deposited Debenture Bonds of defendant, Pioche Mines Consolidated, Inc.

2. That Pioche Mines Consolidated, Inc., the merged corporation, have judgment against Fidelity-Philadelphia Trust Company, Edward C. Dale and against each and all of said parties so joined, in the sum of Three Million ($3,000,000) Dollars.

3. That a permanent injunction be issued enjoining defendant Pioche Mines Consolidated, Inc. from paying any dividends on the stock of the Company owned directly, or indirectly by Fidelity-Philadelphia Trust Company, Percy H. Clark, Robert F. Holden, Albert P. Gerhard, or such other persons as might be found to be parties to Conspiracy alleged in this Cross-Complaint, or from paying any interest payments on Income Bonds or Income Notes of this Company owned directly, or indirectly by Fidelity-Philadelphia Trust Company, Percy H. Clark, Robert F. Holden, Albert P. Gerhard, or such other persons as might be found to be parties to Conspiracy alleged in this Cross-Complaint, until after such parties have fully performed such Order as may be entered by this Court, and fully discharged such payments as may be decreed to be due

from said parties to all or any of the defendants herein.

4. That the Court enter injunctions on such Orders as may be just and equitable against any of the plaintiffs or any and all of said parties who may be joined herein by Order of the Court, to prohibit them or any of them from continuing their part in the conspiracy alleged, or continuing their unlawful acts and interferences against the Merged Company, its Officers and Directors.

5. That this Court enter its Order directing plaintiffs and all of said parties so joined herein to fully perform the remaining unperformed obligations of said Settlement Agreement, to be performed by them respectively.

6. For such other and further relief as may be just and equitable.

DWIGHT, HARRIS, KOEGEL & CASKEY

/s/ By RICHARD E. DWIGHT,

CRAVEN & BUSEY

[Endorsed]: Filed July 29, 1948.

[Title of District Court and Cause.]

MOTION FOR ORDER DIRECTING DEPOSIT IN COURT

Defendant, Pioche Mines Consolidated, Inc., hereby moves the above entitled Court, pursuant to Rule

64 of the Rules of Civil Procedure for the District Courts of the United States, and Nevada Compiled Laws Section 8747, for an order of this Court directing plaintiff, Fidelity-Philadelphia Trust Company to deposit with this Court, or the properly authorized officers of this Court, all of the debentures issued by defendant, Pioche Mines Consolidated, Inc., which are now held by plaintiff, Fidelity-Philadelphia Trust Company as set forth in the Supplemental Complaint on file herein, together with the authority for holding them, said debentures and authority to be held in the custody of this Court, subject to the further order of this Court, to be made after notice to all parties to this action; said deposit to include, as well as said debentures, every evidence of right arising therefrom or connected therewith, for the reasons as set forth in the Affidavit of John Janney attached hereto and marked Exhibit "A" and in the Affidavit of E. G. Woods attached hereto and marked Exhibit "B".

Dated October 21st, 1947.

/s/ FRANCIS T. CORNISH

Attorney for defendant, Pioche Mines Consolidated, Inc.

NOTICE OF MOTION

To: Messrs Thatcher & Woodburn
Messrs Clark, Hebard & Spahr

Please Take Notice: that the undersigned will bring the above motion on for hearing before this Court at its courtroom at Reno, Nevada, on the 10th

day of November, 1947, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated October 21st, 1947

/s/ FRANCIS T. CORNISH
Attorney for defendant, Pioche Mines Consolidated, Inc.

Acknowledgment of Service attached.

EXHIBIT "A"

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR DEPOSIT IN COURT

State of Nevada,
County of Lincoln—ss.

John Janney, being first duly sworn, deposes and says:

That he is one of the defendants above named, and an officer, to wit: the President of defendant, Pioche Mines Consolidated, Inc., a corporation.

Affiant incorporates by reference in this affidavit the Amended Answer, the Answer to the Supplemental Complaint, and a certain proposed counterclaim, a copy of which is on file, attached to a motion for leave of the Court to file the original thereof;

Affiant incorporates by reference also a certain Settlement Agreement dated July 8, 1942, a copy of which is filed in the records of this case as an Exhibit to the Supplemental Complaint herein, which

Exhibit "A"—(Continued)

Settlement Agreement purports to arrive at a settlement of the issues raised in the original Complaint, the Amended Answer, and in Defendants' Counterclaim to be filed herein, which Settlement Agreement provides among other things for the issuance of new 30-year 4% Income Bonds to replace the old debentures of defendant, Pioche Mines Consolidated, Inc., for the issuance of Preference Notes to provide cash for the payment of taxes, other expenses and certain obligations of Defendant Consolidated, as set forth in said Settlement Agreement, and also provides that the mining properties of the Merged company are to be turned into an enterprise profitable to the creditors and stockholders of the merged companies at the earliest possible moment.

Affiant avers that he was present at the meetings of stockholders and all adjournments thereof held for the purpose of consummating the aforesaid Settlement Agreement and voting upon the proposed Merger, provided in said Agreement, and was present also at the meetings and the adjourned meetings of the Board of Directors of Defendant, Pioche Mines Consolidated, Inc., held for the purpose of issuing the new securities and otherwise carrying out the provisions of said Settlement Agreement;

That the action for which both the Stockholders' Meeting and the Directors' meetings were held was obstructed, delayed and thwarted during a period of time which extended from July, 1942, to March, 1945, and from that date down to the present date,

Exhibit "A"—(Continued)

by confusion, doubts and uncertainty in regard to the issuance of the new bonds in payment of the old debentures;

Affiant avers that the confusion, doubt and uncertainty was in the first instance caused by Fidelity-Philadelphia Trust Company and the Debenture-Holders' Committee, and Percy H. Clark, Chairman thereof, in failing and refusing in spite of repeated demands therefor to state definitely which of the debenture-holders had given their consent to the Settlement Agreement, and which had withheld their consent, as provided in Paragraph VII thereof;

That further confusion was caused by Fidelity-Philadelphia Trust Company and Debenture-Holders' Committee who assumed various inconsistent, conflicting and incorrect positions with reference to the status of said debentures and in relation to the settlement, and made use of the inaccuracies in the debenture accounts which had been kept in Philadelphia in the office of Percy H. Clark, so as to confuse, delay and prevent the prompt carrying out of the Settlement Agreement as required by the terms thereof;

That the extent of said confusion and the manner of bringing same about are set forth in letters and telegrams which passed between the Stockholders' Meeting and the Directors' Meeting on the one hand, and Fidelity-Philadelphia Trust Company and Percy H. Clark and the Debenture-Holders' Committee on the other hand, copies of which are hereto attached. The communications to and from

Exhibit "A"—(Continued)

the Stockholders' Meeting being marked as Exhibit SM 1 to 13 inclusive, and the communications to and from the Directors' Meeting being marked Exhibit DM 1 to 39, inclusive;

That the accounts relating to the debenture issue were kept by Percy H. Clark who was appointed a special Vice-President of defendant Pioche Mines Consolidated, to be responsible for the issuance of the debentures and for keeping the accounts relating thereto; and that said Percy H. Clark refused to furnish an audit of his accounts when request was made therefor as is shown by Exhibits PC 1, 2 and 3;

That said Percy H. Clark was at that time also attorney for defendant, Pioche Mines Consolidated, Inc.; and that said Percy H. Clark is now the attorney for the Fidelity-Philadelphia Trust Company in this action, and is also Chairman of the Debenture-Holders' Committee and attorney for the Debenture-Holders;

That Fidelity-Philadelphia Trust Company, contrary to the practice of corporate trustees in such matters, failed in its duties as Trustee in not requiring an audit of the accounts of said Percy H. Clark as a basis for said Trust Company certifying the amounts of the debentures issued, and outstanding by defendant, Consolidated, and that Fidelity-Philadelphia Trust Company made a certification of the debenture issue without the backing of a proper audit to confirm its statements of said debenture account;

Exhibit "A"—(Continued)

That the lack of said audit and the resultant uncertainty was used by Fidelity-Philadelphia Trust Company and Debenture-Holders' Committee to create confusion, which confusion has been used by them in holding up the carrying out of the Settlement Agreement, and has created doubts in the minds of prospective purchasers of Preference Notes, to be issued under Paragraph VI of Settlement Agreement, by rendering uncertain the extent to which said Preference Notes would be a first claim upon the assets of the surviving Company, as was intended in the Agreement;

That said doubts may now be dispelled by the deposit of the debentures now alleged to be on deposit with Fidelity-Philadelphia Trust Company within the keeping of this Court and that if this Court will order said Debentures to be so deposited that such order when carried out by Plaintiffs would avoid the risk of any change of ownership or transfer of possession of said debentures, as long as held within the safe keeping of this Court, since said debentures are bearer-certificates the ownership of which can be passed from hand to hand without registration;

That in the process of carrying out said Settlement Agreement the sale of Preference Notes was and still is the next step which must be taken before cash can be provided which must be in hand if settlement is to be carried out; that the sale of said Preference Notes is the method provided for in said contract and the only method provided for raising the cash to implement the carrying out of said con-

Exhibit "A"—(Continued)

tract, and that the sale of said Preference Notes has been retarded, delayed and made impossible by the action of Fidelity-Philadelphia Trust Company, the Debenture-Holders' Committee, and the Debenture-holders they represent, in creating the aforesaid uncertainty, doubts and confusion and the resulting lack of confidence;

That if defendants are allowed to inspect said debentures along with the signed agreements under which they are deposited, and their auditor is enabled to certify which debentures are so deposited with the Court, and on what terms and conditions they are deposited, a cloud on the sale of Preference Notes would be removed, and the offering for sale of Preference Notes could be made with definite representations as to the true status of said debentures, and there would thereby be facilitated the important matter of providing cash from the sale of said Preference Notes to meet necessary and proper expenditures by defendant Pioche Mines Consolidated, Inc., which sale of said Preference Notes is the only method of obtaining such cash provided for in the Settlement Agreement, to which all parties to the contract are committed to give their best efforts;

That the confusion in the bond account was persisted in by Fidelity-Philadelphia Trust Company down to and beyond February, 1945, as disclosed in a letter from Thomas B. Ringe, attorney for "Fidelity" to Richard E. Dwight, attorney for defendant, Pioche Mines Consolidated, Inc., dated Febru-

Exhibit "A"—(Continued)

ary 27, 1945, reference to which is here made, (Exhibit DM 25);

That the uncertainty and lack of confidence in the Preference Notes authorized under the Settlement Agreement aforesaid, can now only be quickly dispelled to the satisfaction of prospective purchasers of preference notes by the deposit of the debentures in Court;

Affiant is informed that claims have been made to a Director of defendant, Pioche Mines Consolidated, Inc., that debentures heretofore alleged to be on deposit with Plaintiff, Fidelity-Philadelphia Trust Company, are now owned by persons whose names do not appear on the list furnished by Fidelity-Philadelphia Trust Company to said defendant, Pioche Mines Consolidated, Inc., for the purpose of issuing new Income Bonds to be exchanged for said debentures, which said persons are not parties, and therefore unknown to Affiant or to defendant, Pioche Mines Consolidated, Inc.; and affiant is informed, and believes, and therefore states, that if, and only if, said debentures are held in status quo, and without further transfer until the rights of all the parties of this action have been determined, can the rights of the parties under the Settlement Agreement be fully protected and the confusion and uncertainty as to what debenture holders are entitled to receive securities in the new company be determined;

And if said status quo is maintained as aforesaid by deposit of said debentures with this Court, no

Exhibit "A"—(Continued)

harm can result to any of the parties concerned in this litigation, but on the contrary, such deposit with the Court will facilitate the wind-up and settlement of the debenture account and make feasible the sale of Preference Notes as provided in Paragraph VI of the Settlement Agreement, and thus afford an opportunity to defendant, Pioche Mines Consolidated, Inc., to provide the cash required to complete the settlement;

And that if said debentures are not deposited with the Court the sale of the Preference Notes will be delayed further, and the debenture account will not be quickly cleared up by any means satisfactory to prospective investors in said Preference Notes.

Affiant further avers that the past actions of the plaintiffs, done in pursuance of the conspiracy described in defendants' Counterclaim in this action, have created a condition which has placed defendant, Pioche Mines Consolidated, Inc., at a ruinous disadvantage in negotiating a Lease of its properties under terms which will assure an income and which, by its terms, will be profitable to said Company, which Lease all parties by Paragraph IX of the Settlement have agreed to use their best efforts to obtain.

/s/ JOHN JANNEY.

Subscribed and sworn to before me this 20 day of October, 1947.

[Seal] /s/ GLENDA P. QUIRK,

Notary Public in and for the County of Lincoln, State of Nevada.

EXHIBIT PC-1

Law Offices, Clark, Hebard & Spahr,
1500 Walnut St. Building, Philadelphia

Mr. John Janney, February 3, 1940
Pioche, Nevada.

Dear John:

Please accept my resignation as Vice-President of Pioche Mines Consolidated, Inc., to take effect immediately.

Very truly yours,

PHC:M /s/ PERCY H. CLARK.

EXHIBIT PC-2

Mr. Percy H. Clark, February 14, 1940
1500 Walnut Street,
Philadelphia, Pennsylvania

Dear Sir:

Your letter requesting that this company accept your resignation as Vice-President cannot receive consideration until your account has been audited and accepted.

As Vice President you have had entire responsibility for the issuances of bonds and script and no satisfactory accounting has ever been rendered by you to this company. Mr. Lieb, the auditor for your committee, was dissatisfied with your statement of your account and your certificate which accompanied it. He agreed that an audit was necessary and that he would make such an audit on his re-

turn to Philadelphia. We await his or some other satisfactory audit and its acceptance by this company before relieving you of this responsibility by accepting your resignation.

Very truly yours,

PIOCHE MINES CONSOLIDATED,
/s/ By JOHN JANNEY, President.

EXHIBIT PC-3

Law Offices, Clark, Hebard & Spahr,
1500 Walnut Street Building, Philadelphia

Mr. John Janney, February 21, 1940
Pioche Mines Consolidated, Inc.,
Pioche, Nevada.

Dear John:

I have your letter of February 14, declining to accept my resignation as Vice-President until my account has been audited and accepted. I definitely decline to serve any longer as Vice-President of your Company. Recently I have had no authority except to sign scrip certificates in cases of issue in exchange for coupons and in cases of transfer, and I will no longer continue to perform this function.

Mr. Lieb tells me that the statements you attribute to him in your letter are not in accord with his recollection. However that may be, I have no objection to an audit, but do not know what you want to audit. Subscriptions to the debentures of the first issue were secured to the amount of $419,600. payable at the office of E. W. Clark & Co. and

debentures to this amount were certified by Fidelity Philadelphia Trust Co. upon delivery to it of written orders provided for in the Trust Agreement signed by me as Vice President pursuant to authority conferred upon me by resolutions of your Board, certified copies of which are on file with Fidelity. Subscriptions, as received, were deposited to the credit of the account of Pioche Consolidated with E. W. Clark & Co. As subscriptions were paid in full the debentures were delivered to the subscribers. I had nothing to do with these debentures after they were certified by Fidelity and delivered to E. W. Clark & Co., nor have I had anything to do with the cash proceeds, all of which I understand have been withdrawn by Pioche Consolidated.

$60,000 of additional debentures of the first issue were certified on my written order, at your request, and delivered by registered mail to District National Bank, Washington, D. C., and Fidelity Philadelphia Trust Co. holds a registered receipt for these debentures. I have been advised by Fidelity that $3300 of the debentures issued as above were subsequently converted into stock, reducing the amount of the outstanding debentures of this issue to $476,300.

In my letters to Mr. Woods of the past summer I have given him all of the above facts in more detail, as well as others with regard to the scrip and the coupons in exchange for which the scrip was issued, together with certificates of Fidelity and Evans Smith, relating to the outstanding debentures

and scrip. The figures I have given Mr. Woods balance with the figures given by Fidelity and Evans Smith, all of which are in accord with the entries on the books of Pioche Consolidated as shown by Mr. Lieb's report. What is there that I have done in this connection which you want to have audited?

The facts with regard to the debentures of the second issue have all been given to Mr. Woods. They are in accord with the certificates given by the Fidelity and Evans Smith, check with your books, and all cash received has been deposited to the credit of Pioche Consolidated and been withdrawn by that Company. This situation is somewhat more complicated than that of the first series of debentures because of the fact that you subscribed for $50,000 of debentures of the second issue and did not make payment through E. W. Clark and Co. Neither Lee nor Brown have paid their subscriptions in full, Albert Gerhard took your note for the amount subscribed rather than debentures, and the unpaid subscriptions and $40,000 of debentures were pledged as collateral for E. W. Clark & Co.'s $2000 loan. I have already given you all the information I have with regard to all of these matters and will not repeat it in this letter.

Let me know what you want to have audited.

Very truly yours,

/s/ PERCY H. CLARK

PHC:M

Carbon copy sent to 551 Fifth Avenue, New York, N.Y.

EXHIBIT SM-1

[Telegram]

Pioche, Nevada, August 6, 1943

Debenture Holders' Committee,
Percy H. Clark, Chairman,
1500 Walnut St. Bldg., Philadelphia, Pa.

Your telegram August 5th received today fails to answer our telegram August 4th. We ask you to clear doubts raised by your agreements which constitute conditional assents and which can be construed as an out for certain debenture holders after suit is dismissed. Our telegram asks what bonds are and what are not definitely committed to exchange when vote of stockholders ratifies merger agreement and same is filed with Secretary of State, which under the Nevada Statute completes the merger. This question your telegram does not answer. The bonds you represent that will remain outstanding after merger is voted constitutes a doubt which we ask you to clear up. You can clear this doubt by direct answer to our question.

E. G. Woods, Secretary

EXHIBIT SM-2

[Telegram]

Philadelphia, Penn., August 7, 1943

E. G. Woods, Secretary

Pioche Mines Consolidated Inc., Pioche, Nevada.

Answering your nightletter 6th committee is of

opinion all Debenture Holders represented by our committee except only Page owing $400. of debenture will be definitely committed to complete reorganization in accordance with terms of two agreements when merger is consummated. Will confirm by air mail letter of today.

Pioche Debenture Holders Committee
By Percy H. Clark and Albert P. Gerhard

EXHIBIT SM-3

[Telegram]

Pioche, Nevada, August 10, 1943

Debenture Holders' Committee,
Percy H. Clark, Chairman,
1500 Walnut Street Bldg.,
Philadelphia, Pa.

In re your telegram seventh if auditor will certify that the bonds represented by your committee are obligated to accept new securities for old in accordance with terms of settlement agreement, obligation effective as soon as merger is consummated by stockholders approving merger contract and filing same with Secretary of State, would that conform to your authority and bind your debenture holders as implies in your telegram of August Fifth. Please answer Yes or No.

E. G. Woods, Secretary

EXHIBIT SM-4

[Telegram]

August 13

Pioche Mines Consolidated
Pioche, Nevada

Answer your telegram of tenth is Yes.

P. H. Clark, H. P. Gerhard

EXHIBIT SM-5

[Telegram]

Pioche, Nevada, November 29, 1943

Debenture Holders' Committee,
c/o Percy H. Clark
1500 Walnut Street Bldg.,
Philadelphia, Pa.

In absence of confirmation from depositary and to clear up ambiguous and conflicting statements from your committee stockholders' meeting requests you to confirm or deny your letter of August fifth and telegram of August thirteenth as they apply to list of deposited debentures, which we have just received from the Trust Company.

Stockholders' Meeting,
By E. G. Woods, Secretary

EXHIBIT SM-6

[Telegram]

November 30, 1943

E. G. Woods, Secretary,
Pioche Mines Consolidated, Inc.,
Pioche, Nevada

Answering your night letter we confirm our letter of August fifth and telegram of August thirteenth as they apply to list of deposited debentures sent you by Fidelity on November twenty second with counterpart of our letter of same date Stop Of course other parties to settlement agreement are correspondingly bound and must also perform their obligations contemporaneously.

Pioche Debenture Holders' Committee
By Percy H. Clark and Albert P. Gerhard

EXHIBIT SM-7

[Telegram]

Pioche, Nevada, November 30, 1943

Pioche Debenture Holders' Committee,
c/o Percy H. Clark, Chairman
1500 Walnut Street Bldg.,
Philadelphia, Pa.

Your reply to our telegram of yesterday has double meaning. We ask you to be specific. Purpose of telegram yesterday was given you to understand that if there are any named on Trust Company list who are not obligated as you have represented to us in your letter of August fifth and telegram of Au-

gust thirteenth Stockholders' Meeting should know who they are. Meeting requests that you specifically name which if any on said list are not so obligated.

Stockholders' Meeting,
By E. G. Woods, Secretary.

EXHIBIT SM-8

[Telegram]

Philadelphia, Pa., December 1, 1943

E. G. Woods, Secretary,
Pioche Mines Consolidated, Inc.,
Pioche, Nevada.

All on the list are obligated and all deposited bonds coupons and scrip will be surrendered for cancellation contemporaneously with final closing not later than December 31, 1943.

Pioche Debenture Holders Committee,
By Percy H. Clark and Albert P. Gerhard

EXHIBIT SM-9

[Telegram]

Pioche, Nevada, December 1, 1943

Pioche Debenture Holders' Committee,
1500 Walnut Street Bldg.,
c/o Percy H. Clark, Chairman,
Philadelphia, Pa.

You again evade question asked your committee by Stockholders' Meeting. You say all on the list are obligated. Are they all obligated to the terms

of Settlement Agreement as written. Please answer Yes or No.

Stockholders' Meeting
By E. G. Woods, Secretary

EXHIBIT SM-10

[Telegram]

Philadelphia, Pa., December 2, 1943

John Janney, President,
Pioche Mines Consolidated, Inc., Pioche, Nevada

Wood's night letter of first received. Committee has been guilty of no evasion and refuse to answer further unnecessary questions. If your Stockholders' Meeting fails to authorize the merger or you fail to arrange with Thatcher and Woodburn for a closing and the reorganization is not consummated the sole responsibility will rest on you as committee is ready and willing to perform its every obligation as agreed.

Pioche Debenture Holders' Committee,
By Percy H. Clark and Albert P. Gerhard

EXHIBIT SM-11

[Telegram]

Pioche, Nevada, December 2, 1943

Pioche Debenture Holders' Committee,
c/o Percy H. Clark, Chairman
1500 Walnut St. Bldg., Philadelphia, Pa.

Your telegram December second has been sub-

mitted to adjourned Stockholders' Meeting. I am instructed to quote from your telegram following Quote Committee is ready and willing to perform its every obligation as agreed. Unquote Your obligation contained in Clause Seven of Settlement Agreement we now quote as follows: Quote The Debenture Holders' Committee agrees to use its best efforts to obtain the consent of all of the undeposited debentures to this plan of reorganization. Unquote Stockholders Meeting has asked your committee for specific information so that it would know which of the designated debentures have consented to the Contracts of Settlement. I am requested to notify your committee that the Stockholders' Meeting is adjourned to December 9th, and unless you have a list for the meeting of those of the debentures designated in above quoted contract whose consent to the terms of the Settlement Agreement you have not obtained the responsibility will be with your committee and in that case the meeting may assume that your telegram of November thirty is intended to advise us that all of the debenture holders contained in list from Trust Company have assented to the terms of the Settlement Agreement.

E. G. Woods,

Secretary

EXHIBIT SM-12

Law Offices Clark, Hebard & Spahr
1500 Walnut Street Building, Philadelphia 2

December 3, 1943

E. G. Woods, Secretary
Pioche Mines Consolidated Inc.
Pioche, Nevada

Dear Mr. Woods:

The assumption in your night letter of the second is correct.

Very truly yours,

Pioche Debenture Holders' Committee
By /s/ Percy H. Clark
By /s/ Albert P. Gerhard

mac

EXHIBIT SM-13

Copy Air Mail

Law Offices Clark, Hebard & Spahr
1500 Walnut St. Bldg., Philadelphia 2

August 5, 1943

E. G. Woods, Secretary
Pioche Mines Consolidated, Inc.
Pioche, Nevada

My dear Mr. Woods:

This will acknowledge receipt of your letter of July 29, 1943, addressed to me as well as letter dated July 30, 1943, addressed to Messrs. Percy H. Clark, Albert P. Gerhard, Robert F. Holden, members of Debenture-Holders' Committee and signed "Boston

Committee of Stockholders and Creditors by Augustus L. Putnam and Richard K. Baker."

Both of these letters are based on what we consider a wrong construction of the assent to the plan signed by the holders of outstanding debentures which is entirely inconsistent with the real purpose of the document. This form of assent when prepared was sent to Mr. Dwight and he showed it to Mr. Janney and no such construction as is presented in these letters was intended or suggested.

The first paragraph of the assent definitely assents to the merger on the terms and conditions and in the mode, manner and basis set forth in the Settlement Agreement and the Merger Agreement. This is an unconditional assent and complies literally with the obligation imposed upon the Debenture-Holders' Committee by Article VII of the Settlement Agreement.

The last paragraph of the assent does not impose a condition on the first paragraph. It deals with a different matter; namely, the deposit of the bonds with Fidelity under the Pioche Debenture-Holders' Agreement. It gives the Committee a hold on the debentures held by the assenting debenture holders similar to that which they have on the deposited debentures and supplements the assent by a definite agreement to deposit in the event the reorganization is consummated.

The merger will be completed as soon as the stockholders of the several companies at meetings convened as provided in the Nevada Statute vote to approve the Settlement Agreement and the Merger

Agreement, and the Merger Agreement properly certified is filed with the Secretary of State of Nevada. The so-called condition contained in the second paragraph of the form of assent signed by the holders of outstanding debentures has no bearing on the consummation of the merger.

In order to clear up any doubt in the minds of any of the stockholders as to the deposit of outstanding debentures by debenture-holders who have signed the assent, our Committee has arranged with Mr. Dwight to ask for the deposit of the bonds now with the understanding that the depositors may withdraw these bonds in the event the reorganization is not consummated on or before December 31, 1943.

Messrs. Putnam and Baker in their letter of July 30 written on behalf of the Boston Committee of stockholders and creditors at the top of page 3 suggest an alternate method of curing the alleged defect. The undersigned constituting the majority of the Debenture-Holders' Committee desire to accept Messrs. Putnam and Baker's suggestion. The construction of the assent above set forth constitutes the opinion of the Committee as to the real meaning of the form of assent which has been signed by the holders of outstanding debentures as listed in our recent letters and this opinion can be read into and considered part of the assent.

This letter is signed on behalf of the Debenture-Holders' Committee by Messrs. Gerhard and Clark representing a majority of the Committee. Mr. Holden, the third member of the Committee, has

been very ill for several weeks and although he is improving, he is not allowed at the present time to discuss any business matter whatsoever.

Very truly yours,

Pioche Debenture Holders' Committee
under Debenture-Holders' Agreement dated as of February 1, 1939

By /s/ Percy H. Clark
/s/ Albert P. Gerhard

mac

EXHIBIT DM-1

Richard E. Dwight, Esq. May 2, 1944
100 Broadway, New York

Securities received from Pioche Consolidated by Fidelity seem to have been issued in disregard of clear terms of Trust Indenture Act and company has failed to pay original issue tax on the income bonds. Fidelity embarrassed to handle these securities and plans to consult S. E. C. as to their obligations and responsibilities. I have persuaded Fidelity to defer visit to S. E. C. until Saturday, May 6 to give me chance to communicate with you. Will be in New York Thursday for two thirty appointment. Can see you either in morning or after by appointment. Please advise.

Percy H. Clark

Charge to: Clark, Hebard & Spahr, 1500 Walnut Street Building.

EXHIBIT DM-2

Robert F. Holden, May 6, 1944
Albert P. Gerhard,
Percy H. Clark, Chairman,
Debenture Holders' Committee
Philadelphia, Pa.

Gentlemen:

A letter dated May 2, 1944, signed by Percy H. Clark has just been presented to the Board meeting. This reads as follows:

> "I enclose for your information copy of my telegram today to Mr. Dwight."

This letter is unintelligible as is the copy of telegram enclosed to Mr. Dwight.

Because of the possibility that this brief communication, combined with no advices being received by us from the Trust Company, may indicate a continuation of the policy of delay and obstruction in the performance of the settlement agreement, I am directed to notify your committee that any embarrassments or any delays created by communications between your committee or the Trust Company and parties not signatories to the settlement agreement or their attorneys are most regrettable in view of the delays already created by your committee, and that your action is contrary to the spirit, intent and definite provisions of the settlement agreement.

We call to your attention the following:

First: The settlement agreement provides that the securities are to be delivered to the Fidelity

Philadelphia Trust Company on account of the debenture holders' committee.

Second: We are advised that the Revenue Act provides as follows: "Chapter 1, Art. 4, Delivery Essential.—A bond is not issued within the meaning of the law unless and until it is delivered."

Third: The settlement contract comprehends that the Fidelity Philadelphia Trust Company shall make delivery of the bonds in exchange for old bonds under an agreement between them and the debenture holders, and further provides for the payment of issue stamps from the sale of preference notes.

We therefore construe your telegram to mean that the debenture holders' committee will not or cannot arrange with the Fidelity Philadelphia Trust Company to provide necessary cash for the issue stamps to be affixed to the bonds in the aggregate amount of $593.89, and we have this day been advised by the Bank of Pioche that they have telegraphed the Trust Company guaranteeing the payment of the issue stamp tax requirements. No transfer stamps are required under the provisions of the Revenue Act for the exchange of new securities for old under a statutory merger, and to avoid misunderstanding this has been stamped on the certificates.

By Order of the Board of Directors.

. . . . . .

Secretary.

EXHIBIT DM-3

Philadelphia, Penn., 1124 am May 9, 1944
John Janney, Pres. Pioche Mines Co. Cons.
Pioche, Nevada

We have today telegraphed Bank of Pioche as follows:

"Re your night letter telegram May seven we could not deliver bonds without original issue stamps affixed and would require payment in advance Stop Pioche Mines has been advised that income bond and notes should be qualified under trust indenture act of 1939 stop Please advise by return wire your instructions regarding disposition of securities shipped to us Stop If we do not hear from you by ten am Wednesday May tenth will consult Securities and Exchange Commission so that our position will be free of embarrassment Stop We are sending copy of this telegram to Mr. Janney."

318 pm Fidelity Philadelphia Trust Company

EXHIBIT DM-4

Pioche, Nevada, May 9, 1944

Fidelity Philadelphia Trust Co.,
Philadelphia, Pa.

Re telegram 9th, Bank of Pioche is instructed to telegraph cash to cover original issue stamps. Dwight advises no change in bonds needed because of Trust Indenture Act. You are instructed to stamp bonds and deliver same as provided in settlement agreement. We advised merger agreement

meets requirements of the Trust Indenture Act. Stop If you are advised to submit representations to SEC, we notify you that you will be held liable in damages for delays so occasioned unless you first submit to this company the matter that requires the consideration of the commission so that we can join with you in any application to them that may be necessary.

Pioche Mines Consolidated.

EXHIBIT DM-5

Fidelity Philadelphia Trust Co.
Philadelphia, Penna.

June 6, 1944

Pioche Mines Consolidated, Inc.
Pioche, Nevada

Attention: Mr. John Janney, President.

Gentlemen:

Since receiving your telegram of May 13, our general counsel, Morgan, Lewis & Bockius, have considered the question of our position under the Federal Trust Indenture Act and the Securities Act of 1933 in the event that we deliver the securities, and a copy of their opinion is enclosed. In this you will note their conclusions

(a) that under the Trust Indenture Act and the Securities Act we run a risk of liability if we deliver the Income Bonds, and

(b) certain recommendations made with respect to the treatment of outstanding debentures in the event the transaction contemplated by the Merger Agreement is consummated.

If the statement of facts as set forth in the opinion is not in accord with your understanding, will you please let us know promptly.

In our exchange of telegrams mention was made only of the Trust Indenture Act problem, and in view of the doubts expressed by counsel with regard to our position under the Securities Act of 1933, we have not as yet consulted the Securities and Exchange Commission, as we felt it advisable to first place in your hands a copy of their opinion. If, under the circumstances, you care to recall the securities or to join with us in consulting the Securities and Exchange Commission, please advise.

We have advised the Debenture Holders Committee, of our position in this matter, which is that of a ministerial agent, and for your information, we understand that consideration is being given by them as to consulting the Securities and Exchange Commission with a view to determining their own liabilities.

We are taking the liberty of sending a copy of this letter with a copy of the aforesaid opinion to your counsel, Dwight, Harris, Koegel & Caskey.

Very truly yours,

/s/ M. S. Altemose, Vice President.

EXHIBIT DM-6

Pioche Mines Consolidated, Inc.

June 16, 1944

Fidelity Philadelphia Trust Company,
Philadelphia, Pennsylvania

Gentlemen:

Re memo attached to your letter of June sixth, we herewith advise that this does not present a correct statement of the facts.

Debenture Holders Committee has available correct facts if they wish to reveal them to you. We advise you to secure their statement which you can submit to us for correction.

Very truly yours,

Pioche Mines Consolidated, Inc.,

/s/ By E. G. Woods, Secretary

EXHIBIT DM-7

Pioche, Nevada, July 3, 1944

Fidelity Philadelphia Trust Co.,
Philadelphia, Pennsylvania

Please telegraph if you will send us a revised statement which conforms to the fact in accordance with our request in our letter of June 16th.

Pioche Mines Consolidated, Inc.

/s/ E. G. Woods, Secretary

EXHIBIT DM-8

July 25, 1944

Fidelity Philadelphia Trust Co.,
Philadelphia, Pa.

Gentlemen:

Your letter of July 13th replying to our telegram of July 3rd, and our letter of June 16th has had the consideration of Directors meeting.

This reply is unsatisfactory in several particulars.

First, you run the risk of great injury to this company by implications and statements that are incorrect in any ex parte proceedings with the Securities and Exchange Commission relating to a matter that should be handled directly between this company and the S.E.C.

Second, you have refused our request to collaborate in a joint statement of agreed facts.

Third, you have presented through your attorney, Mr. Clark, to the S.E.C. the opinion of your counsel in spite of our protest.

Fourth, if the statements in the letter from your attorney are correct, the vote of the stockholders meeting has been based upon misrepresentation of the facts by the Debenture-holders Committee.

It seems to us that this is not the kind of cooperation you are committed to under the agreement aiming to settle the litigation you have initiated against this company because your action must inevitably result in two conflicting representations to the S.E.C.—one by you and the other by this company, with inevitable delay, confusion and serious loss to this company.

If the securities sent you cannot lawfully be de-

livered, your remedy was to return them to us. We question your right to involve the other parties to the settlement contract in this way.

Very truly yours,

Pioche Mines Consolidated,
By ..... Sec'y.

Copy of letter being sent to the Debenture Holders, bound by the Settlement Agreement:

Pursuant to the terms of the Settlement Agreement of July 8, 1942, under which this company is obligated to deliver to Fidelity Philadelphia Trust Company for your order, income bonds, and shares of stock to be exchanged for the old debenture bonds of this company, we have forwarded your new securities to them for delivery to you.

At the time of drafting the Merger Agreement the attorneys on both sides were of the opinion, expressed in writing, that the securities to be issued would be exempt from S.E.C. regulations. The merger definitely was ratified at stockholders' meetings on the basis that this is a statutory merger under Nevada laws requiring an exchange of securities within the company, and that registration of the securities was not required.

In view of the above and since neither the Settlement Agreement nor the Merger Agreement makes any provision requiring the company to qualify these securities under the Securities and Exchange regulations, accordingly the securities have not been registered under the Securities Act

and must be taken for investment and not for the purpose of resale to the public.

A written opinion from our attorneys has been forwarded to the Securities and Exchange Commission, printed copy of which is enclosed, together with copy of a letter from the counsel of the Securities and Exchange Commission, and a copy of the statement of facts as submitted by this company. Also we enclose a copy of the Settlement Agreement.

These letters are self explanatory. They leave the company in the position that the new securities constitute a private offering and not a public offering, and therefore, by virtue of section 4-(1) they are exempt from registration under the Securities Act and qualification of the indenture under the Trust Indenture Act. The securities were forwarded to the Trust Company on April 17th, 1944.

Respectfully,

Pioche Mines Consolidated, Inc.,
/s/ E. G. Woods, Secretary

EXHIBIT DM-9

Fidelity Philadelphia Trust Company
Philadelphia, Penna.

Mr. E. G. Woods, Secretary Aug. 5, 1944
Pioche Mines Consolidated, Inc.
Pioche, Nevada

Dear Sir:

In reply to your letter of July 25 we regret that you are under a misapprehension as to our position. As mentioned to you before, we are not rep-

resented by Mr. Clark in this matter and your remarks regarding the presentation to the Securities and Exchange Commission should be directed to him. We understand that Mr. Clark has discussed the matter with the staff of the Securities and Exchange Commission but that he did not present the opinion of our counsel, Messrs. Morgan, Lewis & Bockius.

We think we have evidenced our desire to cooperate and if you will recall in several instances asked whether you wanted the securities returned.

As heretofore stated, our position is that of a ministerial agent and as such we believe our position should be free of any liability under the various federal acts before the securities are delivered pursuant to your instructions. While we agree the responsibility is yours and that of the Bondholders Protective Committee, nevertheless, as evidence of our desire to cooperate and to expedite distribution of the securities, we shall be glad to join with you and the Bondholders Committee in discussing the matter with the Securities and Exchange Commission.

Very truly yours,

/s/ H. W. Latimer, Assistant Secretary

GL

EXHIBIT DM-10

September 9, 1944

Fidelity Philadelphia Trust Co.,
135 So. Broad St., Philadelphia, Pa.

Gentlemen:

Your letter of August 5th has been submitted to

adjourned Directors' meeting, and I am directed to write you as follows:

On April 17th, 1944, there was forwarded to you securities for delivery as required by the settlement agreement. Your claim that such delivery is in violation of the Trust Indenture Act of 1939, and Securities Act of 1933, has been brought to the attention of our attorneys Dwight, Harris, Koegel & Caskey, and to the legal department of the United States Securities & Exchange Commission.

For your information we herewith enclose printed copies of—

1. Letter of company to company's attorney.
2. Opinion letter of company's attorney.
3. Letter from the counsel for the U. S. Securities and Exchange Commission.

Also a copy of a letter being sent to the debenture holders who are bound by the Settlement Agreement.

With reference to your statement that you have not intervened in the matter with the S.E.C. and that Mr. Clark did not present the opinion of Morgan, Lewis & Bockius, we call your attention to the fact that the records of the U. S. District Court of Nevada show that you are represented in this litigation by Mr. Percy H. Clark and his law firm, who have interviewed the S.E.C. contrary to our request to you to the effect that a statement of facts should be approved by us before any interference by your attorneys should be had, in a matter that was prim-

arily one between this company and the Securities Commission.

Also we believe Mr. Clark will confirm that the opinion of Messrs. Morgan, Lewis & Bockius was in his possession, and that he made use of this letter in his conference with the Securities & Exchange Commission.

Very truly yours,

Pioche Mines Consolidated, Inc.,

.....

Secretary.

EXHIBIT DM-11

Morgan Lewis & Bockius
2107 Fidelity-Philadelphia Trust Building
Philadelphia, Pa.

September 19, 1944

Fidelity-Philadelphia Trust Company
135 South Broad Street
Philadelphia 9, Pennsylvania

In Re: Pioche Mines Consolidated, Inc.

Dear Sirs:

In our letter to you dated May 31, 1944, we reviewed at length the applicability of the Trust Indenture Act of 1939 to the situation presented by the issuance of 4% Income Debenture Bonds due December 1, 1973, of Pioche Mines Consolidated, Inc. which you have been requested to deliver to certain designated holders of Pioche Mines Consolidated, Inc. Debentures, and advised you that in

view of the uncertainties involved, you would run a risk of subjecting yourself to the penalty provisions of the Trust Indenture Act in delivering the Income Bonds unless the matter had first been cleared with the staff of the Securities and Exchange Commission.

In this connection you have submitted to us a letter dated September 9, 1944, from the Secretary of Pioche Mines Consolidated, Inc. with which he included a pamphlet setting forth copies of the following:

1. Letter of John Janney, President, Pioche Mines Consolidated, Inc., to Dwight, Harris, Koegel & Caskey, relating to this problem.

2. Opinion letter of Richard E. Dwight, Esq., dated July 11, 1944, in reply thereto.

3. Letter dated July 31, 1944, of Edward H. Cashion, Esq., Counsel, Corporation Finance Division of the Securities and Exchange Commission.

In Mr. Cashion's letter he reviews the facts as set forth in the two prior letters mentioned above, and concludes as follows:

"You of course appreciate the question whether a particular offering is public or private in nature is dependent upon all the facts and circumstances and one which, to a large extent, depends on intention, which in turn frequently depends on intangible factors best known to the parties to the transaction and their counsel. However, on the basis of the facts presented, I would not be inclined to recommend that the Commission take any action in

the event the company proceeds with the proposed transaction without registration under the Securities Act, or compliance with the indenture and qualification requirements of the Trust Indenture Act, upon advice of your counsel that the transaction is exempt therefore by the exemption specified in the preceding paragraph of this letter."

You have asked that we consider the situation in the light of Mr. Cashion's letter and advise you regarding the delivery of the Income Bonds pursuant to the instructions of Pioche Mines Consolidated, Inc.

In this connection you have received from Percy H. Clark, Esq., a copy of his letter dated September 15, 1944, to Mr. Robert McKeller of the staff of the Securities and Exchange Commission with which he enclosed a copy of the pamphlet referred to above and in which he requests an opportunity "to supplement and correct the facts presented" in the pamphlet.

On the record thus before us we find a presentation of the matter by the Company to counsel for the Securities and Exchange Commission and a reply from him, which, while not binding on the Commission, in our view so far as you are concerned has the effect of removing the risk which you as agent might otherwise have incurred in delivering the securities. However, Mr. Clark has apparently taken exception to certain of the facts upon which he believes Mr. Cashion's opinion was based, and

you quite properly feel that you cannot ignore Mr. Clark's position.

Under the circumstances we are of the opinion that you should inform both the Committee and the Company that you intend to deliver the Income Bonds as requested by the Company, if within a reasonable period of time, which in our opinion should not exceed ten days, you do not receive instructions to the contrary from the Securities and Exchange Commission.

If the Committee should raise objection to this course of procedure it will become necessary for you to consider the termination of your position as depositary for the Committee as Fidelity is not a party to the Settlement Agreement, and we find nothing in the various agreements authorizing you to make delivery of the Income Bonds over the objections of the Committee. If your position as depository is terminated, the Bonds should be returned to the Company.

Such controversy as has arisen, or may arise, is between the Committee and the Company, and your desire not to be involved should be appreciated by both parties.

We suggest that you advise the Securities and Exchange Commission of the position which you determine to take.

Very truly yours,

/s/ Morgan, Lewis & Bockius

EXHIBIT DM-12

Fidelity-Philadelphia Trust Company
Philadelphia, Pennsylvania

(9) September 22, 1944

Pioche Mines Consolidated, Inc.
Pioche, Nevada

Attention: E. G. Woods, Secretary

Dear Sirs:

We have your letter of September 9th with enclosures including the pamphlet containing a copy of the letter of Edward H. Cashion, Esquire, Counsel of the Corporation Finance Division of the Securities and Exchange Commission on the subject of the applicability of the Securities Act of 1933 and the Trust Indenture Act of 1939 to the issuance by your Company of the various securities contemplated by the Settlement Agreement dated July 8, 1942, between your Company and others. As you are aware, Mr. Clark has written to Mr. McKeller of the Staff of the Securities and Exchange Commission under date of September 15, 1944, requesting an opportunity "to supplement and correct the facts presented" to Mr. Cashion.

We have consulted our Counsel in this matter, Messrs. Morgan, Lewis & Bockius and enclose for your information a copy of their letter dated September 19, 1944, which we trust you will find self-explanatory.

In view of their advice, we will deliver the Income Bonds on Monday, October 2, 1944, if we do not receive instructions to the contrary from the Securities and Exchange Commission.

If this proposed procedure is objectionable to the committee, we will communicate with you immediately.

Very truly yours,

M. S. Altemose, Vice President.

MSA:DH

EXHIBIT DM-13

Fidelity-Philadelphia Trust Company
Philadelphia, Pennsylvania

(9) Air Mail

Pioche Mines Consolidated, Inc., Oct. 4, 1944
Pioche, Nevada

Attention: Mr. E. G. Woods, Secretary

Gentlemen:

With further reference to our letter of September 22, 1944, and particularly the last sentence and paragraph thereof, we enclose copy of letter which we have this day sent to Pioche Debenture Holders' Committee, which we believe is self-explanatory.

Very truly yours,

/s/ H. W. Latimer, Assistant Secretary

HWL:DH

EXHIBIT DM-14

Fidelity Philadelphia Trust Company

October 4, 1944

Pioche Debenture Holders' Committee
c/o Percy H. Clark, Esq.,
15th Floor, 1500 Walnut Street Building
Philadelphia 2, Pennsylvania

Dear Sirs:

This will acknowledge receipt of your letter received October 2, 1944, signed by Mr. Percy H. Clark and Mr. Albert P. Gerhard.

In your letter objection is raised to the distribution of the Income Bonds particularly, because, owing to Mr. Holden's illness, the Committee has not had an opportunity to take certain steps considered by it to be essential. You state that Mr. Holden has now returned to Philadelphia after a long absence.

This is to advise you that we will defer consideration of our position as depositary for a period of two weeks. At the end of two weeks we shall consider the matter further, which should allow ample opportunity for the Committee to consult with Mr. Holden and to take such steps as may be deemed appropriate.

We desire to have it clearly understood that we take no position with respect to the differences which may exist between various interested parties.

Very truly yours,

H. W. Latimer, Assistant Secretary

HWL:DH
CC: E. G. Woods, Secretary

EXHIBIT DM-15

Clark, Hebard & Spahr
1500 Walnut Street Bldg., Philadelphia 2

John Janney, President — October 6, 1944
Pioche Mines Consolidated, Inc.
Pioche, Nevada

Dear John:

I enclose for your information copy of a letter sent by the Debenture Holders Committee to Fidelity today, and am sending another copy to Messrs. Dwight, Harris, Koegel and Caskey. I have also written to Mr. Cashion that the Committee has taken this action and that this means I will not file a statement of corrections and supplemental information with him.

Very truly yours,

/s/ Percy H. Clark

PHC:mod Enc.

EXHIBIT DM-16

October 6, 1944

Fidelity-Philadelphia Trust Company,
135 South Broad Street, Philadelphia 9, Pa.

Attention: M. S. Altemose, Vice President.

Dear Mr. Altemose:

The undersigned Committee at a meeting attended by all of the members of the Committee have decided to accept the securities delivered to Fidelity by Pioche Mines Consolidated, Inc. on behalf of the

debenture holders who have deposited their debentures under the Debenture Holders Agreement dated as of February 1, 1939, subject, however, to the performance by Pioche Consolidated of the remaining obligations assumed by it by the Settlement and Merger Agreements.

You are therefore directed in accordance with the Debenture Holders Agreement to continue to hold the debentures, scrip and coupons deposited under that agreement as collateral for the reasonable reorganization expenses as defined in the Settlement Agreement. Direction for the surrender of these securities for cancellation will be given in time for the consummation of the reorganization.

The new securities received by you from Pioche Consolidated should not be issued to the debenture holders in exchange for your outstanding receipts until the reorganization is consummated in accordance with the terms of the agreements. The Committee directs that these new securities be held for the protection of the debenture holders as provided in Article G of the Debenture Holders Agreement until such time as the Committee can give directions for their distribution.

Very truly yours,

Pioche Debenture Holders Committee

By Percy H. Clark
Albert P. Gerhard

EXHIBIT DM-17

Fidelity Philadelphia Trust Co.

October 9, 1944

Pioche Debenture Holders' Committee
Percy H. Clark, Esq.,
1500 Walnut Street Building 15th Floor
Philadelphia 2, Pennsylvania

Dear Sirs:

This will acknowledge receipt of your letter of October 6, 1944, stating that the Committee has decided to accept the Securities delivered by Pioche Mines Consolidated, Inc. on behalf of depositing Debenture Holders, "subject, however, to the performance by Pioche Consolidated of the remaining obligations assumed by it by the Settlement and Merger Agreements."

We understand further from your letter that Mr. Janney has been advised of your position in this respect.

Fidelity-Philadelphia Trust Company, as you know, is not a party to the Settlement Agreement and can therefore assume no responsibility in determining when the remaining obligations to which you refer, have been performed. To clear the matter, therefore, and to put us in a position in which we can properly act pursuant to your letter of October 6th, this is to advise you that we will deliver the securities when we have received appropriate instructions from your Committee.

Inasmuch as your letter indicates that your Com-

mittee approves the form of the securities, it would seem that matters have progressed to a stage where a closing may be held, and in this connection we trust that your Committee and the Company may soon work out a plan directed toward this end.

We take this occasion to point out that at such closing all of the outstanding Debentures under the two Indentures dated January 2, 1929, and October 1, 1930, should be surrendered to us as Trustee thereunder for cancellation, and Pioche should take proper corporate action for the discharge of these Indentures. In this connection we would, of course, expect to receive payment of our Trustee's fees of which we have heretofore advised the Company.

We are sending a copy of this letter to the Pioche Company.

Very truly yours,

H. W. Latiner, Assistant Secretary

HWL:DH

CC: Mr. E. G. Woods, Secretary, Pioche Mines Consolidated, Inc.

EXHIBIT DM-18

PHC:mod-6 November 1, 1944

To Holders of Non-Negotiable Receipts of Fidelity-Philadelphia Trust Company for Debentures of Pioche Mines Consolidated, Inc. Deposited under Debenture Holders Agreement dated February 1, 1939:

Some progress has been made toward the con-

summation of the reorganization of Pioche Consolidated, as follows:

On December 27, 1943 the stockholders of Pioche Consolidated at an adjourned session of the stockholders meeting originally called for July 15, 1943 approved the Settlement and Merger Agreements and the latter was filed the same day in the office of the Secretary of State of the State of Nevada and the properties of the several companies thereby became merged under the laws of Nevada into Pioche Consolidated, the surviving company of the merger.

Late in April, 1944, Fidelity received from Pioche Consolidated the income bonds and stock of Pioche Consolidated in the names of the debenture holders who had deposited their bonds under the Debenture Holders Agreement, but in the opinion of Committee's counsel concurred in by counsel for other interested parties, there was doubt as to whether the requirements of the Securities Act and the Trust Indenture Act had been complied with.

Under date of July 31, 1944 Edward H. Cashion, counsel for the Corporation Finance Division of the S.E.C. at the request of Pioche Consolidated gave his opinion dated July 31, 1944 based on facts submitted to him by Pioche Consolidated that there had been no public offering of the securities to be issued and he would not be inclined to recommend the Commission take any action in the event the company proceeds with the proposed transactions without registration under the Securities Act or com-

pliance with the indenture and qualification requirements of the Trust Indenture Act.

Although the income bonds delivered to Fidelity by Pioche Consolidated are in rather unusual form, your committee in order to avoid further delay has decided to accept the bonds in the form offered, subject, however, to the performance by Pioche Consolidated of the further obligations assumed by it in the Settlement and Merger Agreements and has so advised Fidelity and Pioche Consolidated.

The Debenture Holders Committee was appointed by and derives its power from the Debenture Holders Agreement which among other things authorizes it

(a) To borrow from Fidelity not to exceed $17,500. for its expenses;

(b) to negotiate an arrangement in the nature of a reorganization or settlement;

(c) to determine the time for the performance of actions provided for in the agreement and all details relating to the carrying out of the agreement and any arrangement or settlement negotiated by Committee thereunder.

It has borrowed $9,000. and has incurred additional obligations for expenses to date amounting in total to something less than $13,000. as more particularly set forth in statement attached.

The debenture holders who signed the Debenture Holders Agreement (owning debenture to the amount of $455,500.) and deposited their debentures thereunder agreed by that agreement to repay the Fidelity on demand the amount loaned by Fidelity

to the Committee for the purpose of paying the expenses to be incurred in carrying out the trust agreements and the Debenture Holders Agreement together with interest and each of them further agreed to indemnify the Fidelity against any expense or liability incurred by it in carrying out the trust agreements and the Debenture Holders Agreement.

$687,300. of debentures of the two issues were certified by Fidelity as trustee as follows:

Those deposited under the Debenture Holders Agreement by those who signed the agreement	$455,500	
Those deposited by those who did not sign	142,100	
Those to be turned in by Pioche Mines Consolidated, Inc.	89,700	$687,300
Debentures to be cancelled without the issue of new securities		85,250
Leaving to be exchanged for Income Bonds and Stock under the plan		$602,050

There have been deposited with Fidelity under the Debenture Holders Agreement $597,600. in face value of debenture together with scrip and coupons appertaining thereto as security for the amounts loaned to the Committee and subject to this pledge for the protection of the debenture holders.

That agreement also provides all moneys advanced by holders of debentures and scrip shall be repaid in full before any distribution is made to holders of debentures and scrip or coupons of securities or funds recovered through any arrangement or settlement, and the holders of debentures

who make payments to Fidelity shall have a claim to the extent of the amounts paid by them respectively against the debentures, scrip and coupons deposited and any such funds or securities subject only to the claims of Fidelity. After Fidelity's claims are satisfied it will hold the securities in the capacity of a ministerial agent subject to the directions of your Committee.

The Settlement Agreement dated July 8, 1942 provides for the issue of 5% Preference notes payable in five years with a stock bonus which "shall be issued in face amount equal to all new moneys furnished to pay the reasonable reorganization expenses which must be paid in cash". The definition of reasonable reorganization expenses in this agreement includes among other things "the reasonable disbursements of the Debenture Holders Committee". Pioche Consolidated has stated among the facts submitted to Mr. Cashion as the basis for his opinion that these notes to the extent necessary will be taken by less than (10) ten of the company's stockholders so there seems to be no doubt the new moneys required to consummate the reorganization will be provided in a manner that will not involve a public offering.

In accordance with these two agreements your Committee has directed Fidelity to continue to hold the debentures, scrip and coupons deposited as collateral for the reasonable reorganization expenses and not to deliver the new securities received for the account of the debenture holders in exchange for the outstanding receipts until the reorganiza-

tion is consummated in accordance with the terms of the agreements. Direction for the surrender of the deposited securities for cancellation and the distribution of the new securities will be given by your Committee at the proper time.

The pending law suit is to be discontinued by all parties in time to consummate the reorganization. Your Committee even before the completion of the merger and several times since suggested to Pioche Consolidated a final closing settlement at which all parties could perform their several remaining obligations contemporaneously, but this suggestion has not been accepted up to date. Your Committee is waiting to learn what alternate method, if any, Pioche Consolidated has to suggest.

Pioche Debenture Holders Committee
under Debenture Holders Agreement
dated February 1, 1939
Percy H. Clark
Albert P. Gerhard
Robert F. Holden

EXHIBIT DM-19

Pioche Mines Consolidated
Pioche, Nevada

Robert F. Holden November 16, 1944
Albert P. Gerhard, Percy H. Clark, Chairman
Debenture Holders' Committee, Philadelphia, Pa.

Gentlemen:

Your circular letter dated November 1, 1944, ad-

dressed to the Philadelphia Debenture Holders of the Pioche Mines Consolidated, has been brought to the attention of the Board of Directors at adjourned meeting.

I am directed to write and request certain modifications of this letter or correction in the misleading nature of certain statements contained therein, in order that the security holders you have addressed may have a more accurate picture of the events concerning which you have addressed them.

In our opinion it is not a correct representation of the facts for you to say that the meeting called for July 15th did not approve the settlement until December 17th, and omit to say that the meeting voted the merger just as soon as they had received from your committee assurances to the effect that all debenture holders, not signers to the Settlement Agreement but whom you claimed to represent, (especially those who were provided for in clause 7) were obligated to the specific terms of said agreement "as written". (See our telegram of Dec. 1st and letter of July 29, 1943.)

In your circular letter you note the long interval of time between July 15th, date of meeting, and December 17th date of voting approval of Merger, but you withhold the information that would disclose the fact that during that time your Committee by evasive, conflicting and ambiguous replies to the simple request from the stockholders' meeting, delayed our action; and that this meeting was held in session, by this procedure of your committee, from July to December, 1943.

Under the circumstances therefore, we request that you bring to the attention of the same persons to which this circular letter has been shown the communications sent by the stockholders' meeting to your committee, as follows:

Letters of:

July 29, 1943 - Nov. 29, 1943, to Debenture Holders' Com.

Aug. 11, 1943 - Nov. 29, 1943, to Thatcher & Woodburn, Reno.

Aug. 13, 1943 - Nov. 30, 1943, to Debenture Holders' Comm.

Oct. 4, 1943 - Dec. 1, 1943, to Debenture Holders' Comm.

Oct. 8, 1943 - Dec. 2, 1943, Dec. 21, 1943, to Debenture Holders' Comm.

Also letter of Aug. 7, 1943 addressed to Debenture Holders' Committee, signed by the Boston Committee of Stockholders and Creditors, by R. K. Baker.

And also the following letters sent by the stockholders' meeting to the Fidelity Philadelphia Trust Company, copy to your committee:

Letter of Nov. 3, 1943 - Nov. 8, 1943 - Nov. 17, 1943.

When you withhold in your circular letter the information contained in the foregoing communications you are, in the opinion of the Board of Directors, misleading your associate security holders who are entitled to have this information, and to whom you owe this consideration. This for the obvious reason that they should have the opportunity to select other representative to conduct this important busi-

ness for them, or else ratify your acts with reasonable knowledge of what acts they are ratifying.

With reference to the sale of preference notes, it is perfectly clear that the debenture holders are entitled to receive their proper ownership in the new securities promptly, in exchange for present ownership in the old, in order that the old debentures may be cancelled and thus give clearance for the sale of the preference notes with the rights provided for in the settlement contract.

There is nothing in the Settlement Agreement which calls for any round table conference, or for a future meeting to arrange for a settlement. The settlement contract itself contains what was agreed to as a settlement, and as you well know it was signed by all the parties thereto, except your committee, with the definite understanding that no further negotians would be had with your committee, because our position was that the contract would not even be submitted to the other signers until you had become obligated by signing the same.

There is a specific provision in the contract that certain cash obligations are to be paid, but they are to be paid from the sale of preference notes, and this provision, ipso facto, makes the sale of preference notes, a condition precedent to the further steps in the settlement procedure, and of course you must know this and therefore your refusal to proceed promptly with the exchange of securities is a step tending to make the preference notes unsaleable, except at great disadvantage to the company, for which you and your associates should be held

responsible as well as for the other delays you have occasioned in violation of contract. The fact that the Trust Company has an agreement with your group of security holders, or that they have a lien on your securities under your arrangements with them, is no excuse whatever for your not expediting the sale of the preference notes. You can hold the new securities as collateral in place of the old, and thus protect both of your obligations—your contract with the Fidelity Trust Company, and your contract with the signers of the Settlement Agreement.

With reference to expenses;—We are of the opinion that your circular is defective in disregarding our letters of March 16th and April 26th, 1944, to your committee, in which this Board has asked for the expenses of your committee to be itemized in the same descriptive language as used in the settlement contract. You should inform the debenture holders that to date you have given no categorical specific answer to this question as we asked you to do. Your letter to the Boston Committee of Stockholders and Creditors relative to your expenses, on the strength of which they were induced to sign the settlement agreement, should also be shown to all debenture holders who are to be accurately informed in reference to the part of your circular letter which deals with this subject.

The Board of Directors feel they have a right to require of you a more accurate presentation to the debenture holders than your letter of November 1st gives them. Also it is the opinion of this Board

that you are again breaching the Settlement Agreement, the spirit and intent of which is expressed in paragraph 1, page 1:—"as speedily as possible to accomplish * * * so that the properties of these companies may at the earliest possible moment be turned into an enterprise profitable to the creditors and stockholders * * *".

We charge that during the past two years these properties could have been under operation during high metal prices and as a benefit to the war effort except for your deliberate acts of non-cooperation, delay and opposition.

By Order of the Board of Directors,

Pioche Mines Consolidated,

/s/ E. G. Woods, Secretary.

EXHIBIT DM-20

Air Mail December 5, 1944

Pioche Mines Consolidated, Inc.
John Janney, President
Pioche, Nevada

Gentlemen:

Your letter of November 16th received. The Debenture Holders Committee can not see that anything can be accomplished by discussion of matters which have nothing to do with the consummation of the reorganization. On the other hand we should discuss and decide what steps are necessary to con-

summate the reorganization in accordance with the terms of the contracts already in force.

Of course, the preference notes should not be issued by the company or accepted by the purchasers until all of the old obligations including debentures as well as other debts are cancelled and the reorganization is consummated in accordance with the plan. What applies to the issue of the preference notes applies with equal force to the issue of the income bonds and income notes. The issuer should not issue or the old security holders accept these securities except in connection with the consummation of the reorganization.

There are numerous things to be done which must be done contemporaneously. The purchasers of the preference notes will not pay in the purchase price until the old debentures and other debts are paid. The Committee can not deliver the deposited debentures or distribute the new securities until the debt for which they are pledged is paid. Fidelity can not cancel any of the debentures until they are all turned in for cancellation and it can not be expected to join with the other parties to discontinue the law suit until its fee is paid. In view of this situation the Committee has suggested there should be a final closing settlement at which all unperformed obligations shall be performed contemporaneously and the reorganization concluded.

Pioche Consolidated has rejected this suggestion. After all the obligation rests on it to carry through to completion the reorganization it has started. Please advise the Committee what steps Pioche Con-

solidated proposes to take to accomplish this end.

Our Committee is prepared to surrender the deposited bonds to the trustee for cancellation, request the plaintiffs in the law suit to join with defendants in the discontinuance of the law suit and cooperate with Pioche Consolidated for the consummation of the reorganization in any respect not inconsistent with what has been said above. It will, of course, distribute the new securities to those entitled thereto as soon as the reorganization is consummated.

Fidelity-Philadelphia Trust Company has requested that the debenture holders who signed the Debenture Holders Agreement repay the amounts loaned prior to January 1, 1945 in accordance with the provisions of the first paragraph of Article G of that agreement. Committee is about to request the debenture holders to pay the amounts due by them respectively prior to the said date. The Committee proposes to mail with the request a copy of Pioche Consolidated's letter to Committee dated November 16, 1944 and a copy of this letter as well as a statement of the facts leading up to the present situation. This will give the debenture holders the opportunity to select other representatives to conduct this important business for them or else to ratify the Committee's acts with reasonable knowledge of what acts they are ratifying as suggested by Pioche Consolidated.

Committee at the proper time expects a disclosure of all of the material facts relating to the reorganization as required by law in order that it may

intelligently discharge its obligations to the debenture holders whom it represents.

Pioche Debenture Holders Committee
By Percy H. Clark, Chairman

PHC:mod

EXHIBIT DM-21

December 13, 1944

Fidelity Philadelphia Trust Co.,
Philadelphia, Pa.

Gentlemen:

On September 22nd, 1944, after conferring with your attorneys Messrs. Morgan, Lewis & Bockius, you wrote as follows:

"In view of their advice, we will deliver the income bonds on Monday, October 2, 1944, if we do not receive instructions to the contrary from the Securities and Exchange Commission".

We also quote the following from your attorney's letter dated September 19, 1943:

"Under the circumstances we are of the opinion that you should inform both the Committee and the Company that you intend to deliver the Income Bonds as requested by the Company, if within a reasonable period of time, which in our opinion should not exceed ten days, you do not receive instructions to the contrary from the Securities and Exchange Commission".

You will kindly advise us if you have received instructions to the contrary from the Securities and Exchange Commission, and confirm whether you have exchanged the new income bonds for the old

debenture bonds? If you have not, will you please advise us what clause in the Settlement Agreement you were acting under in continuing to withhold delivery of these securities.

You will please recall that this company refused to vote approval of Settlement Agreement or Merger Agreement until we were given to understand that all debenture holders on your list had given you authority to make this exchange, as provided in Settlement Agreement, immediately upon our voting the merger and filing papers with the Secretary of State as provided for in Nevada Law. You therefore have this authority vested in you.

It is obvious that the sale of preference notes can be had under terms more advantageous to this company after the exchange of securities is actually consummated. This is clearly contemplated within the provisions of the settlement agreement, as well as in the assurances given to the stockholders' meeting based on which the vote was taken that approved the merger. Furthermore this vote was deferred until such assurances were given to the stockholders' meeting, which took from July to December, 1943. Since that time we have again been held up by the Debenture Holders' Committee and your refusal to conform to the terms of said agreement to our damage.

Meanwhile we have received no satisfactory reply to our letter of November 16, 1944, from the Debenture Holders' Committee, requesting them to correct certain statements in Circular Letter to their associated debenture holders, which letter we con-

sider misleading and requiring correction. We wish you to have in your records a copy of our communication which is enclosed.

We do not concur with your statement that you are not a party to the Settlement Agreement. We wish to repeat what we have said in former communications to you that the Settlement Agreement was proposed by your attorneys, while they were acting as such in the conduct of this case. You were plaintiff in the action, and Defendant in the counter action. Conspiracy was charged, and at the time your attorneys proposed a settlement you were on examination as a witness in the case, and in our view giving evidence relevant thereto.

The Settlement Agreement not only was proposed by your attorneys of record while acting in that capacity in the conduct of the case, but it was not submitted to the other signers until after the rough draft of proposed settlement, as initialed by your attorneys, was agreed to by them and in finished form signed by the Debenture Holders' Committee. It was explicitly not to be submitted to this company or to the other creditors until after the final drafting of the Settlement Agreement was duly executed by the Bondholders' agents.

Moreover the terms of the Merger Agreement provided for in said Settlement Agreement were drafted in form satisfactory to your attorneys of record in the case before the settlement was finally approved, or submitted to stockholders' meeting. We cannot concur that you are not a party of the Settlement Agreement.

Moreover it was definitely stated and understood that the other interests would never hold any further negotiations with the Debenture Holders' Committee, but that after said Committee were positively bound, a yes or no answer would be given them. The Settlement Agreement was drawn with this understanding, and by its terms corroborates this. We therefore point out that your cooperation with the Debenture Holders' in this regard is in violation of the settlement.

By Order of the Board of Directors,

Respectfully,

E. G. Woods, Secretary

EXHIBIT DM-22

January 3, 1945

Fidelity Philadelphia Trust Company
Philadelphia, Pa.

Gentlemen:

In order that you may be more thoroughly enlightened as to the representations that were made to the stockholders' meeting, based upon which they voted their ratification of the merger agreement, and in order that you may understand that the list of the debenture holders sent to the stockholders' meeting by you were represented to us as "definitely committed to exchange when vote of stockholders ratifies merger agreement, and same is filed with the Secretary of State, which under Nevada statute completes the merger", we are sending you

herewith copy of our telegram of August 6th bearing on this question, addressed by the Secretary of this company to the debenture holders' committee, and a copy of the following telegrams which relate to the definite commitment by the debenture holders' committee that all on the list you sent us were so committed, namely:

August 7, August 10, August 13, November 29, November 30, November 30, December 1, December 1, December 2, and December 3.

You will see from these telegrams that in acting under the directions of the debenture holders' committee you were acting at variance with the assurances and representations made to this company, which representations were made with the intention of inducing them to vote their approval of the merger agreement, whereby certain properties were conveyed to this corporation, and you are acting in cooperation with the debenture holders' committee in violence to these assurances given to the company, and based upon which representations valuable properties were conveyed to the company by parties who relied upon the assurances given.

In the foregoing circumstances this company demands that you give to your attorneys authority and direction to appear in court in your behalf, and agree to the dismissal of this suit, sending us a copy of such authority, and that you immediately proceed to exchange the ownership of the old securities for the ownership in the new securities, so that the title to the new securities may pass subject to such claims as you may have upon them, to the deben-

ture holders on your list in exchange for the old securities which you are now holding subject to the provisions of the settlement agreement, and that the preference notes may be sold in conformity to the assurances given to the stockholders' meeting.

By Order of the Board of Directors,

E. G. Wood, Secretary

EXHIBIT DM-23

February 14, 1945

Fidelity Philadelphia Trust Company
Philadelphia, Pennsylvania
Attention: Mr. Marshall S. Morgan, President

Gentlemen:

Our letter to you dated December 13, 1944 signed by E. G. Woods, Secretary, written on the order of the Board of Directors of this Company is still without reply.

The meeting of the Board of Directors which is now in session being held in New York, attended by the representatives upon the Board of the Boston interests, the Virginia interests, the Philadelphia interests and represented by the Western interests by the President of the Company, is giving consideration to our letter to you of December 13, also to our letter to the Debenture Holders' Committee dated December 30, copy of which was heretofore sent you, but for the purpose of the record an additional copy is enclosed herewith duly signed by the Secretary of the Company.

We next refer to the file recently sent you enclosing copies of the telegram of August 6 from the stockholders meeting signed by E. G. Woods, Secretary, which asked "what bonds are and what are not definitely committed to exchange when vote of stockholders ratifies merger agreement and same is filed with Secretary of State which under the Nevada statute completes the merger". This file also contains copies of August 7, August 10, August 13, November 29, November 30, November 30, December 1, December 1, December 2, December 2, December 3.

The Board of Directors now wishes to advise you that the vote of the stockholders ratifying the Settlement Agreement and voting the merger was passed on the basis of assurances from the Debenture Holders named in the list sent this Company by Fidelity Philadelphia Trust Company, that their bonds were obligated to be exchanged for the new bonds and stock, to be issued under the Settlement Agreement immediately upon the voting of the merger and filing of the papers with the Secretary of State,

1. With reference to the stockholders voting approval of the Settlement Agreement,

2. With reference to the creditors who held a prior claim on the assets of the Pioche Mines Company and who relinquished their claim which they did, under Nevada law, when the merger papers were filed with the Secretary of State.

Since it is true that the vote of the stockholders of the Company and also the vote of the holders of

preferred claims against the assets of the Pioche Mines Company was obtained by the representations made by the Debenture Holders' Committee, and since the Debenture Holders' Committee was informed at the time that the vote so recorded was based upon such representations, we as a Board of Directors deny your right to conduct the business of these bond holders based upon any order to you from the Debenture Holders' Committee, which conflicts with these representations, and we are of the opinion that any refusal to exchange old securities for the new on the part of either the Fidelity Philadelphia Trust Company or the Debenture Holders made in the circumstances above referred to is an act which we believe to be a part of a conspiracy to delay or defeat the lawful right of this Company to proceed with the remaining steps which need to be taken and which are provided for in the Settlement Agreement.

Accordingly we ask that you advise us within ten days of receipt of this letter that the exchange of ownership of the new securities for the old has been made or that such exchange has been refused to be made. As soon as you notify us that the exchange of ownership has been made we will then be in a position to report to the remaining creditors and stockholders that the opposition to the consummation of these agreements by Fidelity Philadelphia Trust Company, acting together with the Philadelphia Debenture Holders, has been terminated and that we are ready to proceed with the remaining steps provided for in the Settlement

Agreement. Both sets of securities can be retained by you pending any necessary settlement between you and the Debenture Holders whom you represent.

Very truly yours,

/s/ Pioche Mines Consolidated Inc.
August L. Putnam, Boston Director
J. Harry Crafton, Virginia Director
Wm. Innes Forbes, Philadelphia Director
John Janney, President.

Confirmed
Boston Committee of Stockholders and Creditors
/s/ Richard K. Baker
Acting under irrevocable power of attorney.

EXHIBIT DM-24

Fidelity-Philadelphia Trust Company
135 South Broad Street, Philadelphia 9

February 24, 1945

Mr. Augustus Putnam, Boston Director
Mr. J. Harry Crafton, Virginia Director
Col. Wm. Innes Forbes, Philadelphia Director
Mr. John Janney, President
Pioche Mines Consolidated, Inc., Pioche, Nevada

Gentlemen:

Your letter of February 14, 1945 was delivered to me on February 16, 1945, by Col. Wm. Innes Forbes. I have delayed my answer until this date only because I wished to discuss the subject thereof

with Messrs. Morgan, Lewis & Bockius who are counsel for Fidelity-Philadelphia Trust Company with respect thereto.

The letters of earlier dates to which you make reference were received in due course and referred to Messrs. Morgan, Lewis & Bockius. About the middle of January, Mr. Ringe of that firm advised us that he had been in communication with Messrs. Dwight, Harris, Koegel & Caskey, counsel for Pioche Mines Consolidated, with regard to this entire matter and that he expected to confer with Mr. Dwight and others during the week of January 22nd and before he left the City, which he contemplated doing on or about January 28th. On January 27th Mr. Ringe advised us that while both he and Mr. Dwight had made every effort to hold the conference which had been planned, it had not been possible to do so and that because of his absence from the City for about two weeks, it had been agreed that the conference should be deferred until his return during the week of February 12th.

After Mr. Ringe's return, he undertook to communicate with Mr. Dwight for the purpose of arranging the planned conference but before he was able to communicate with him your letter was delivered to me. He was unable to reach Mr. Dwight until Wednesday, February 21st, after your letter had been referred to him. Mr. Ringe advises us that he and Mr. Dwight have agreed to confer early in the coming week when it is expected that the arrangements for the exchange may be completed.

Please understand that our counsel, Messrs. Mor-

gan, Lewis & Rochius, have been instructed to make every effort to promptly clear the several matters discussed in your letter. It is my personal hope and expectation that this will be done.

The original of this letter is being sent to Mr. Janney, the President of the Company, and copies are being sent to the other gentlemen addressed.

Very truly yours,

/s/ M. S. Morgan, President

February 24, 1945.

EXHIBIT DM-25

Morgan Lewis & Bochius
2107 Fidelity-Philadelphia Trust Building
Philadelphia, Pa.

February 27, 1945

Richard E. Dwight, Esq.,
Dwight, Harris, Koegel & Caskey,
100 Broadway, New York 5, N. Y.
Re: Pioche Mines, Consolidated

Dear Mr. Dwight:

This letter is addressed to you following our several conversations in the course of which we briefly discussed the differences which have arisen between Pioche Mines, Consolidated (acting through its president and directors) and the Debenture Holders Committee.

This firm is counsel for Fidelity-Philadelphia Trust Company (sometimes herein referred as to "Fidelity") and it is for the firm in that capacity that I write this letter.

May I preliminarily very briefly state the situation as I understand it to be, after my study and examination of the information which has been submitted to me, and then in reply to the letter of your clients addressed to Fidelity, to the attention of Mr. Marshall S. Morgan, the president, on February 14, 1945, take up Fidelity's position?

Fidelity is trustee under an agreement dated January 2, 1929, providing for the issue of "Five Year 7% Convertible Debentures" by Pioche Mines, Consolidated, to mature on January 1, 1934, under which debentures are now outstanding in the princapital amount of $476,300. Fidelity is also trustee under an agreement dated as of October 1, 1930, providing for the issue of "Convertible 7% Sinking Fund Gold Debentures" by Pioche Mines, Consolidated, to mature October 1, 1937, under which debentures are now outstanding in the principal amount of $211,000. Under the two agreements Fidelity is trustee for two classes of outstanding debentures having a gross principal amount of $687,-300.

Following the default of Pioche Mines to the holders of the debentures, Fidelity also became depositary under an agreement dated as of February 1, 1939, for debentures of both classes. Debentures in the principal amount of $597,600. have been deposited with Fidelity under this depositary agreement; for these debentures there are certificates of deposit outstanding which must ultimately be retired.

As of July 8, 1942, after the institution of a suit

by Fidelity (as trustee under the trust agreements and pursuant to the direction of a majority of the debenture holders and of the Committee under the Depositary Agreement) and after extended negotiations, a settlement agreement was entered into between the Company, the Debenture Holders Committee and a Creditors Committee, under which a reorganization and merger was agreed upon.

From the foregoing very brief statement it is apparent that Fidelity has obligations under both the two trust agreements (of January 2, 1929 and October 1, 1930) and the depositary agreement of February 1, 1939. While under all three agreements its primary obligation is to the debenture holders, it has obligations to the Company and, in addition, under the provisions of the depositary agreement, has obligations to the committee representing the depositing debenture holders.

Those representing the Company and the Committee have now expressed different views with respect to the course of procedure which they respectively believe Fidelity should follow under the settlement agreement, with the result that Fidelity, occupying the position of trustee under two agreements and depositary under another, finds it is in a position where it is difficult to please both those representing the Company and those representing the Committee, to both of whom it has obligations under the several agreements.

Fidelity is most anxious to settle all of the existing differences as quickly as possible, and has instructed this firm to make every effort to promptly

clear the several matters so far as it is possible to do so. It is in that endeavor that I address this letter to you as counsel for the Company and those acting for it. It is my hope that we will be able to work out a plan under which the necessary steps may be taken and to which the Committee will agree, although I desire to make it quite clear that we do not represent the Committee and do not speak for either it or its members.

In the recent letter received by Fidelity from your clients, under date of February 14, 1945 (written during the course of my discussions with you) the several previous letters addressed by your clients to Fidelity (which were then also the subject of our discussions) are reviewed, together with certain other correspondence, following which the statement is made that the Settlement Agreement was entered into upon assurances received from Fidelity that the debenture holders who were represented by it were obligated to make the exchange provided for in the Settlement Agreement. This statement is followed by this language:

"* * * We as a Board of Directors deny your right to conduct the business of these bond holders based upon any orders to you from the Debenture Holders' Committee, which conflicts with these representations, and we are of the opinion that any refusal to exchange old securities for the new on the part of either the Fidelity-Philadelphia Trust Company or the Debenture Holders made in the circumstances above referred to is an act which we believe to be a part of a conspiracy to delay or defeat the lawful right of this Company to proceed with the

remaining steps which need to be taken and which are provided for in the Settlement Agreement."

Please understand that Fidelity is not "Conducting the business of the bond holders" upon orders from anyone which are in conflict with any previous representations, and that it does not refuse to exchange the old securities for the new. On the contrary and in direct reply to the question put by your clients, Fidelity is prepared to make the exchange provided for in the agreements and which is requested by your clients just as soon as the essential steps preliminary thereto have been taken.

Further, and in reply to the last paragraph of the letter of your clients, dated February 14, 1945, please understand that Fidelity has never opposed and does not now oppose the consummation of the settlement and merger agreements.

In our opinion, the essential steps which must be taken preliminary to the exchange are:

1. The receipt by Fidelity of all outstanding debentures totaling $687,300, in principal amount as follows:

$602,050 for exchange of new securities and thereafter cancellation

$ 85,250 for cancellation without the issuance and exchange of new securities.

While Fidelity now holds as depositary $597,600 in principal amount of these debentures, there are still outstanding $89,700, all of which I am advised are controlled by your clients.

Do you not agree that the delivery to Fidelity of

all outstanding debentures is an essential preliminary step and, if so, will you be so kind as to advise me as to how your clients will arrange for the delivery thereof to Fidelity.

2. The receipt by Fidelity of new income bonds in the amount of $602,050 to be distributed in exchange for outstanding debentures.

I am advised that Fidelity has received income bonds in the principal amount of $539,800 which I have tentatively concluded to be $62,250 short of the amount required. I am advised that Mr. Janney in a letter dated April 17, 1944, addressed to Fidelity, stated that certain debentures were not being sent. While, as I have previously indicated, I believe these debentures should be forwarded, the amounts therein listed (E. W. Clark & Co. $40,000., Lee $12,-500., Brown $2250. and Brook $2500.) amounting to $57,250, would appear to leave to be received $5,000 in order to make up the $602,050., or $550. to make up $597,600. the principal amount of the debentures now represented by Fidelity.

Do you not agree with my conclusion that the full amount of income bonds to be distributed should be in the possession of Fidelity before the exchange is made?

3. The receipt by Fidelity of 55% of 47½% of the common stock of the new company for the account of the debenture holders which it represents.

The agreements call for the delivery of 1,112,287 shares. I am advised that Fidelity has received only 1,005,766. My tentative conclusion is that the bal-

ance of these shares should be delivered before the exchange is effected.

4. The receipt by Fidelity of an amount sufficient to cover its trustee's fee and expenses.

I have not been advised as to how these payments are to be made and will be glad to have you enlighten me.

5. The receipt by Fidelity of an appropriate commitment on the part of your clients, and particularly those who signed the letter of February 14, 1945, addressed to Mr. Marshall S. Morgan, that in consideration of the exchange the remaining steps required of them for the consummation of the settlement and merger agreements will be taken. Among these steps is the fulfillment of the obligations to the Debenture Holders Committee.

It would seem that the caring for the details necessary to complete all of these steps may be amicably worked out between us and I am prepared to go into this with you.

There are, of course, additional steps which Fidelity must take before the settlement agreement is consummated. Fidelity is prepared to take these steps as the program for the settlement advances and it becomes appropriate for it to do so.

As I have stated before, I shall be pleased to confer with you about any phase of this matter. I will, of course, welcome an opportunity to discuss with you any suggestion which you may have with respect to Fidelity's position as herein stated, and I will gladly go to New York for that purpose.

Will you be so kind as to let me hear from you.
Very truly yours,

R. /s/ Thomas B. K. Ringe

EXHIBIT DM-26

New York City, N. Y., March 8, 1945

Fidelity Philadelphia Trust Co.
Philadelphia, Pa.

Attention: Mr. Marshall S. Morgan, President.

Gentlemen:

We are naturally disappointed in receiving no answer to the letter handed to you by Col. Forbes, which gave you the attitude of the board of directors of this company, in that you have not by now seen to it that someone in your company has given the reply to the questions asked you in our letter of December 13, 1944, which brings into very definite focus whether or not the Securities Exchange Commission has modified their expression with reference to the legality of the issue of securities which were sent you almost a year ago.

You delay distribution upon the excuse that this issue might be in violation of the Trust Indenture Act. In your letter of September 22, 1944, you definitely agreed that you would deliver the income bonds on Monday, October 2, 1944, if you did not receive instructions to the contrary from the Securities Exchange Commission.

With reference to your letter of February 24, we do not see what bearing the absence of Mr. Ringe

for two weeks or failure of Mr. Ringe to have conferences with Mr. Dwight or others could possibly have upon your giving us a courteous answer to our questions and I am advised by the directors to enclose a copy of resolutions enacted at yesterday's meeting and to inform you that we are still considering that you are in violation of the Settlement Agreement and that you have not complied with our request in our letter of February 14, that you give us an answer within ten days from that date, which leaves us only to believe that you in cooperation with the Debenture Holders' Committee and other debenture holders are determined to delay the necessary proceedings provided to be taken in the Settlement Agreement of July 8, 1942, to the great damage of this company and its security holders.

By order of the board of directors.

/s/ Augustus L. Putnam
Secretary of the Meeting

EXHIBIT DM-27

Fidelity-Philadelphia Trust Company

Airmail March 12, 1945

Mr. Augustus L. Putnam
Pioche Mines Consolidated, Pioche, Nevada

Dear Mr. Putnam:

This is to acknowledge the receipt of your letter of March 8, 1945, mailed from New York City and addressed for attention of Mr. Marshall S. Morgan,

who has asked me to reply. I regret that I do not know where in New York you may be reached, for had I such information this letter would undoubtedly be received more quickly than through being forwarded from Nevada.

While you state that you are disappointed "in receiving no answer to the letter" handed to Mr. Morgan by Colonel Forbes, you, of course recognize that Mr. Morgan did make reply to your letter of February 14th under date of February 24th, for you mention that reply in the third paragraph of your letter. Mr. Ringe advised us that he had talked with Mr. Dwight on the telephone and that Mr. Dwight stated that he, Mr. Dwight, was counsel for Pioche Mines Consolidated. We instructed Mr. Ringe and his firm to make every effort to promptly clear the matters discussed in your letter of February 14th and I am advised that steps to that end are now under way.

Mr. Ringe advises me today that he has personally been in touch with Mr. Dwight and with Mr. Tuttle of the firm of Dwight, Harris, Koegel & Caskey, during the course of which he sets forth the position of this Company which has heretofore been informally stated by us to the representatives of Pioche Mines Consolidated. I am somewhat surprised that the position of the Company as stated by Mr. Ringe has not been made known to you and to your associates.

In your letter and in the copy of the resolutions which accompanied it there is the suggestion that

this Company has been intentionally and without reason attempting to delay the consummation of the settlement agreement and I think it appropriate to state very clearly that this suggestion is without foundation.

This Company is prepared to make the exchange provided for in the agreements, just as soon as the essential steps preliminary thereto have been taken. Our counsel have made known the nature of these steps and the questions remaining to be cleared. I see no reason why the details which remain cannot be promptly cared for and the exchange effected. However, before this may be done, it will be necessary for someone representing the Company to give consideration thereto. I have no doubt whatever but that your counsel are now doing just that.

May I suggest that you consult Messrs. Dwight, Harris, Koegel & Caskey, and if there is any further step that I may take in order to expedite this matter, I shall be glad to have you advise me.

Very truly yours,

M. S. Altemose, Vice President

MSA:DH

CC: Mr. Augustus L. Putnam, 79 Beacon Street, Boston, Mass.

EXHIBIT DM-28

Dwight, Harris, Koegel & Caskey
100 Broadway, New York 5, N. Y.

Thomas B. K. Ringe, Esq. March 16, 1945

Messrs. Morgan, Lewis & Bockius
2107 Fidelity Philadelphia Trust Bldg.
Philadelphia, Pa.

Re: Pioche Mines, Consolidated

Dear Mr. Ringe:

Your letter of the 27th ultimo was duly received.

As I advised you over the telephone, the Board of Directors of Pioche Mines, Consolidated, have advised me that they do not consider that any more conferences between Pioche Mines, Consolidated, and its counsel and Fidelity Philadelphia Trust Company and its counsel are necessary or proper pending completion of the Settlement Agreement, to which I agree.

After further advisement, there are two things the Consolidated Company ask the Trust Company to do immediately, both of which are clearly required by the Settlement Agreement and no preliminary steps are required.

First: The Trust Company should advise Pioche Mines, Consolidated, of its acceptance of the new debentures of the reorganized company and accompanying stock in payment of and to the exchange for the debentures of the old company, as indicated in the letter of transmittal from Pioche.

Pioche does not ask that the old debentures be cancelled at the present time and certainly does not ask that the trust indentures of which the Trust Company is trustee should be cancelled.

The foregoing is necessary in order to complete the settlement agreed upon.

Second: The Trust Company should immediately instruct its attorneys in Nevada to consent to and arrange for the discontinuance, without costs, of the existing litigation.

The present suit while pending is a cloud on the title of the new Consolidated Company, and it is an impediment to negotiating a lease of the property and to obtaining subscribers to the prior preference notes, which under the Settlement Agreement the management have agreed to use their best efforts to do.

We trust Fidelity Philadelphia Trust Company will see not only the obvious justice but the necessity for complying with the two foregoing requirements and not delay the completion of the reorganization any further.

As I advised Mr. Clark in my letter to him of January 16, 1945, in my opinion both the Fidelity Philadelphia Trust Company and the Debenture Holders' Committee are in default under the Settlement Agreement.

Very truly yours,

Richard E. Dwight

EXHIBIT DM-29

Fidelity Philadelphia Trust Company
Philadelphia 9, Pennsylvania

Air Mail April 3, 1945

Pioche Mines Consolidated
Pioche, Nevada

Gentlemen:

We refer to our correspondence relating to your requests that we accept the new debentures of the reorganized company and the accompanying stock to be exchanged for the debentures of the old company, and your further request that we issue instructions to our attorneys in Nevada to discontinue the existing litigation.

Our counsel, Messrs. Morgan, Lewis & Bockius, have advised us that before granting these requests, certain essential steps preliminary thereto should first be taken. These steps have been outlined in a letter addressed by Thomas B. K. Ringe, Esq. of Morgan, Lewis & Bockius, to Richard E. Dwight, Esq., counsel for you, under date of February 27, 1945, a copy of which we enclose.

Mr. Dwight has written Mr. Ringe under date of March 16, 1945, and we have given further consideration to the entire matter.

Because of our desire to cooperate in the completion of the settlement agreement, we have decided to discontinue the suit and have accepted the new securities to be exchanged for the debentures of the

old company. It is understood, of course, that this acceptance is upon the express understanding that the remaining steps to be taken by Pioche Mines Consolidated will be taken with reasonable promptness. The old debentures and the trust indentures under which they were issued will not now be cancelled and the new securities will be held subject to the rights of Fidelity.

Further, we are today instructing our attorneys in Nevada to take such steps as may be necessary to join in with other counsel of record for the discontinuance of the existing litigation, including both the original suit and all counter-claims, in such manner as will dissolve all attachments and satisfy all liability under outstanding bonds of indemnity.

Please understand that Fidelity does not consider itself in default under the Settlement Agreement and believes that it has a clear right to continue to refuse to take the steps requested until it has in its possession all of the old debentures, income bonds and common stock of the new company as described in Mr. Ringe's letter. However, it is taking the steps herein outlined upon the assumption that these steps (which it believes should have been taken prior to this time) will be taken within the immediate future and in order that its good faith will be no longer questioned. [Printer's Note: Foregoing paragraph typed in capital letters.]

Will it not be possible for someone representing Pioche Mines Consolidated to confer either with us or with our counsel in order that the important problems which remain may be properly cleared?

We have requested Mr. Ringe to take up with Mr. Dwight the several matters discussed in Mr. Janney's letter to us of April 17, 1944.

Very truly yours,

/s/ M. S. Altemose, Vice President

MSA:DH

EXHIBIT DM-30

April 11, 1945

Fidelity Philadelphia Trust Company,
Philadelphia, Penna.

Attn: Marshall S. Morgan, Pres.

Gentlemen:

Your letter of April 3rd addressed to this company has had our consideration. A special meeting of our full Board of Directors is called for April 24th to give further consideration to this letter.

Meantime, I am directed to call to your attention that our position was clearly stated to you as result of Director's meeting held in March in New York. Especially that we wish obstructions raised by you to the sale of preference notes, authorized under the settlement agreement, to be ended.

As you should know from letters you have received, we cannot confirm alterations, changes, amendments to nor approve violations of the terms of the settlement agreement without the written consent of all parties thereto, which you of course realize is impossible to obtain.

This company has issued and sent you for delivery all securities called for by the settlement

agreement, and in accord with your list sent us, except such as are in question in the Nevada court, and such as you have no authority to ask for, according to our records.

The conditions set forth in the letter you enclosed from your attorneys, dated February 27th, are not in accord with the settlement agreement as you of course know, and the errors contained in this letter should be corrected unless you wish your position to be based upon erroneous assumptions.

You say certain essential steps, preliminary to granting our requests (that you should remove the cloud you have caused as an impediment to the sale of preference notes), have been outlined in this letter of your attorneys. You further state that your granting our request is conditioned and requires that things should be done which the settlement agreement clearly does not provide shall be done, and that steps outlined in the letter of your attorneys, but which are not called for in the settlement, shall be taken by this company with reasonable promptness.

It is difficult to see how our full meeting of Directors can look upon such conditions and requirements as intended to facilitate the sale of preference notes, which is the next step in consummation of the settlement of the litigation as provided in settlement contract.

It might appear on the contrary that the complicated method you have chosen to set up these requirements and conditions in your letter, and the inclusion of the misconstruction and misconceptions

in the letter you enclose, and which you include by reference in paragraph two of your letter, rather tends to show that you are trying to increase rather than dispel the difficulties to the sale of the preference notes.

It is hard to see how any prospective investor could ever tell from your letter what your future actions or requirements will be, or when, or if ever the conditions you will make will have been concluded, nor whether the signed settlement agreement is not being replaced by another and different arrangement.

Respectfully,

Pioche Mines Consolidated, Inc.,
/s/ E. G. Woods, Secretary

EXHIBIT DM-31

Mr. Richard E. Dwight April 11, 1945
100 Broadway, New York, N. Y.

Dear Mr. Dwight:—

We have a letter from the Fidelity Philadelphia Trust Company, under date of April 8th, a copy of which I enclose.

You will note that the Fidelity asserts the right to continue to refuse to take the steps we requested until all of the old debentures, income bonds and common stock of the new company, described in Mr. Ringe's letter to you of February 27th, are in their possession. Also you will note that their will-

ingness to accept the delivery of the securities sent them is upon the condition, or with the understanding, that we will take immediately the steps outlined by Mr. Ringe.

We of course cannot do this, nor can we find any provisions in the settlement agreement for our delivery to the Fidelity or any securities other than the ones we have already delivered to them.

Mr. Ringe's letter of February 27th to you is a hodge-podge of inaccuracies, misunderstandings, misconceptions, and erroneous statements some of which we went into with you in our meeting in New York, and I am afraid the Board of Directors will consider when a full meeting is had that instead of going forward we have gone backward as a result of our recent communications with the Trust Company, particularly as it involves Mr. Ringe and the firm of Morgan, Lewis and Bockius. These gentlemen evidently have received so much misinformation that they would never be able to understand or interpret the language of the settlement agreement, and we would prefer that you have no further conferences with them, but stand on your last letter as the final word.

With best wishes and kindest regards,

Sincerely yours,

/s/ John Janney

jj/gq. enc.

EXHIBIT DM-32

Fidelity-Philadelphia Trust Company
Philadelphia (9), Pennsylvania

Air Mail April 19, 1945

Mr. E. G. Woods, Secretary
Pioche Mines Consolidated
Pioche, Nevada

Dear Mr. Woods:

This is in reply to your letter of April 11, 1945, addressed to Mr. Marshall S. Morgan, President of this Company, the tenor of which we do not understand.

In our letter of April 3, 1945, we endeavored to clearly and briefly state the reasons why we had not theretofore considered it appropriate to accept the new securities in exchange for the old and discontinue the pending litigation. In the course of that statement, we referred to the letter addressed by Mr. Ringe of the firm of Morgan, Lewis & Bockius to Mr. Dwight under date of February 27, 1945, a copy of which we enclosed. We then stated that because of our desire to cooperate, we would not adhere to the position which we had taken (and which we believed had been correct) but would accept these securities and discontinue the litigation. We thereupon did accept the securities and immediately instructed counsel to take the necessary steps for the discontinuance of the litigation, all as stated in our letter.

We decided to make the change in our position

because we had reached the conclusion that the "deadlock" which had developed should be broken and we undertook to do so. We cannot understand your dissatisfaction with these steps as we anticipated that they would have your complete approval.

The undisposed of questions relate to the differences between the securities requested and those received, and the completion of the settlement and merger agreements, the consummation of which we desire to expedite. We are of the opinion that if it were possible for our representatives to discuss these matters, which we considered details, they would be promptly and satisfactorily disposed of.

We desire to state with clarity and with emphasis that we are imposing no conditions beyond the contemplation of the agreements between the parties, that we do not suggest any amendments to any of the agreements, that we have not (and do not now) raised any obstructions to the sale of your notes, and that we have earnestly endeavored to cooperate with you.

Further, we believe it pertinent to add that we have consulted our general counsel, Messrs. Morgan, Lewis & Bockius, with respect to this matter because of your very apparent lack of confidence in Mr. Clark. Messrs. Morgan, Lewis & Bockius, in accordance with our request, have been endeavoring to be helpful in disposing of such differences as may exist.

We believe that all of these matters may be satisfactorily completed with reasonable promptness if it were possible for us to approach and discuss them with you with less acrimony and a more cooperative

spirit. It is our hope that this may be done and we stand ready to receive your suggestions with respect thereto.

This letter is being sent by Air Mail and with the thought that you may have left Pioche before it reaches you, a copy is being mailed to Mr. Dwight at New York in order that it may be available for your information at the meeting to be held there on April 24th.

Very truly yours,

/s/ M. S. Altemoso

MSA:DH

EXHIBIT DM-33

April 25, 1945

Fidelity Philadelphia Trust Company,
Philadelphia, Pa.

Attn. Mr. Marshall S. Morgan, President.

Gentlemen:—

We have given consideration to your letter of April 19th. If this letter is intended to remove the cloud on the sale of the preference notes by your acceptance of the securities sent you for exchange under the settlement agreement, it is necessary in the nature of the case that your acceptance should be unconditional, or at least that the conditions should be clearly stated, should be specific and should be within the provisions of the settlement agreement as a condition precedent under the agreement to the exchange of the securities.

In order to make sure that there is no misunderstanding on this point we have telegraphed you as follows:—

"Fidelity Philadelphia Trust Company
Philadelphia, Pa.

Your letter of April 19th. Do you accept securities unconditionally? Please answer yes or no.

/s/ Pioche Mines Consolidated."

Respectfully submitted,

Pioche Mines Consolidated, Inc.,

By order of Board of Directors,
/s/ E. G. Woods, Secretary.

EXHIBIT DM-34

[Telegram]

6 s co 20

Philadelphia Penn 102 pm Apr 26 1945
Pioche Mines Consolidated,
Pioche, Nevada.

Re your telegram April 25 securities have been accepted. Only condition is the performance of obligations imposed by existing agreements.

Fidelity Phila Trust Co

1240 pm

EXHIBIT DM-35

Fidelity-Philadelphia Trust Company
Philadelphia (9), Pennsylvania

AIRMAIL May 2, 1945

Mr. E. G. Woods, Secretary
Pioche Mines Consolidated
Pioche, Nevada

Dear Mr. Woods:

This is in reply to your letter of April 25, 1945, addressed to this company to the attention of Mr. Marshall S. Morgan, President.

We have not imposed conditions upon our acceptance of the securities and have never intended to impose any conditions. However, we are quite naturally required to perform our obligations under the provisions of existing agreements and cannot waive the performance on the part of others of their obligations under those same agreements.

It was for this reason that we replied to the telegram quoted in your letter of April 25th as follows:

> "Re your telegram April 25. Securities have been accepted. Only condition is the performance of obligations imposed by existing agreements."

May we repeat that we have at no time either imposed any new conditions or intentionally taken any step which might be interpreted as doing so. We have, however, consistently endeavored to confer with someone authorized by you to confer with us

for the purpose of clearing the details which naturally must be taken care of in order that a matter of this size and complexity may be satisfactorily cleared. We have no doubt at all but that if such a conference were possible either between us and one of your representatives, or between someone representing our counsel, Morgan, Lewis & Bockius, and someone representing your counsel, the questions which must be straightened out could be promptly and satisfactorily disposed of.

Since our letter of April 3, 1945, following which we instructed our counsel to immediately arrange for the discontinuance of the pending litigation, we were advised by them that they promptly undertook to do so and gave the necessary instructions to Mr. George B. Thatcher of Thatcher and Woodburn, Reno, Nevada, Messrs. Morgan, Lewis & Bockius state that under date of April 7, 1945, Mr. Thatcher wrote them that the instructions given were sufficient and that he was immediately proceeding to carry them out; they further state that Mr. Thatcher has since advised them that Bruce R. Thompson, Esq., wrote Mr. Thatcher under date of April 18, 1945, as follows:

"I am informed by my clients in the above matter that I am not at the present time authorized to stipulation to a dismissal of the above designated action. Their unwillingness so to stipulate is the result of the failure of your clients to comply fully with the terms of the settlement and merger agreements. You are undoubtedly informed as to the details of this situation as there has been considerable

correspondence regarding it among the parties involved.

"Whenever I receive different instructions I will inform you."

Both our counsel, Messrs. Morgan, Lewis & Bockius, and we are prepared to meet with you or with your representative at any mutually convenient time.—Very truly yours,

/s/ M. S. Altemose, Vice President

MSA:DH

EXHIBIT DM-36

May 16, 1945

Fidelity Philadelphia Trust Co.,
Philadelphia, Pa.

Attn. Marshall S. Morgan, President.

Gentlemen:—

Your letter of May 2nd has been submitted to this meeting of the Board of Directors of this company.

The condition which you attach to the acceptances of these securities is noted. Your condition is stated to be "the performance of obligations imposed by existing agreements", which you say is your only condition.

This is to notify you that this company in acting under the settlement agreement of July 8, 1942, has performed all obligations imposed upon it by this contract down to clause VI thereof.

For your information we quote from clause VI the following:

"The parties hereto realize that it will be necessary to obtain certain sums of cash in Order to Consummate the Proposed Reorganization. All parties hereto agree to use their best efforts to obtain such cash in exchange for preference notes with the stock bonus as above provided. * * * ".

You have no authority to hold these securities subject to conditions which you may choose to impose, as condition precedent to their delivery, where such conditions precedent are not set forth in the contract of settlement, especially where you thereby interfere with the sale of the preference notes in violation of Clause VI.

We have not sent you these securities to hold but to exchange. We deny giving you any authority to hold the new securities. After ownership is passed to the old Bondholders you may hold these new certificates under their authority, if such is authorized by their contract with you. You have our authority to hold the old bonds after the exchange of ownership is effected.

You are on notice that these securities were voted to be issued based on assurances from the Debenture Holders Committee that all Debenture Holders on the list you sent us were obligated to exchange old securities for new immediately upon the events which were fulfilled when you received these securities. You were sent these securities for the purpose of fulfilling this obligation.

Please advise us when this exchange has been ef-

fected and we will immediately proceed to sell the preference notes provided for in Clause VI.

By Order of the Board of Directors,

Pioche Mines Consolidated, Inc.,
/s/ Augustus L. Putnam, Acting Secretary

EXHIBIT DM-37

Fidelity-Philadelphia Trust Company
Philadelphia (9), Pennsylvania

Air Mail June 18, 1945

Pioche Mines Consolidated, Inc.
Pioche, Nevada

Gentlemen:

Your letters of May 16th and May 28th have been received.

In our previous letters to you, we have endeavored to make clear that we are doing all within our power to cooperate with you in the proper consummation of the Merger and Settlement Agreements.

You have urged (1) that we accept for exchange the securities which we received and (2) that we discontinue the pending litigation.

We have advised you that the securities have been accepted for exchange and that we have instructed our counsel to take appropriate steps for the discontinuance of the pending litigation. We have also advised you that our counsel have been informed that your counsel will not now agree to this discontinuance of the litigation upon instructions from you.

We do not understand why, instead of having some one of your representatives confer with us or with our representative with respect to the clearing of the remaining details, you insist that we are imposing conditions (which we have not imposed) and are failing to take appropriate steps which we would gladly take if you did not object thereto. While we do not understand the necessity of so doing, we are very glad to again advise you that the securities which you forwarded to us have been accepted in exchange for the old and that both are now being held subject to existing liens and to the clearing of the necessary details in the final consummation of the Agreements. Further, we believe it may be pertinent to observe that we have never had any objection to your proceedings in accordance with your stated intention of taking such steps as may be appropriate in completing the program agreed upon.

In accordance with your request, we have read your letter addressed to the Committee as enclosed with your letter addressed to us under date of May 28, 1945, and while we are naturally concerned with your controversy with the Committee, we do not intend to become involved therein excepting so far as it may be necessary to maintain the integrity of our own position.

May we again repeat the suggestion (which we have already several times made) that we desist from further correspondence of this nature and put our joint efforts to the achieving of the results which you state your desire. We will be glad to meet with you or meet with your representative to

any convenient time in an effort to reach a working basis so that this may be done.

Sincerely yours,

/s/ M. S. Altemose, Vice President

MSA:DH

EXHIBIT DM-38

June 27, 1945

Fidelity Philadelphia Trust Company,
Philadelphia, Pa.

Attn. Marshall S. Morgan, President.

Gentlemen:—

Your letter of June 18th replying to our letter of May 16th is acknowledged.

The interpretation of your letter and the adjustment of interpretation between your letter of June 18th and a letter received the same day from the debenture holders' committee presents difficulties which would seem to call for another full meeting of our Board.

It would appear impossible for any officers of the company to take the responsibility of deciding whether your letter is intended to be an abandonment of your former position that the ownership of the securities would not be passed until your undefined requirements have been met, or whether you are now taking a new and different position to the effect that the old debenture bonds which were to be exchanged for the new income bonds sent you in April, 1944, are now dead, or whether they are still alive and assertable as a claim in contradiction of

the rights of those who would become purchasers of the preference notes authorized under the settlement agreement.

If it is in accord with your interpretation of your letter that the old bonds give way to the sale of the preference notes, we would request that you advise us to this effect in such definite terms as that your letter if submitted to our auditor will result in a balance sheet, showing that the new income bonds sent you are now a claim upon the assets of the company subsequent to the preference notes, and that the old debenture bonds are discharged by your acceptance of the new income bonds.

It is our construction of the settlement agreement that all parties are obligated to assist in the sale of the preference notes by giving them a prior position. In view of the conflicting statements in the various letters which have been written to us on this subject, it would appear entirely proper for those who would purchase preference notes to expect such a statement. Therefore to resolve these doubts which your letters have created we suggest that an auditors statement be authorized that would clear up these doubts, with a resulting balance sheet which would show that the exchange has been effected.

Your reluctance to give us a clear statement of your position which could be clearly construed as consistant with the priority in interest which the settlement agreement intends to be accorded to the preference note holders have created fears in the minds of those who would otherwise long before this have purchased the preference notes. An auditor's

statement and balance sheet to be used as a basis for the sale of preference notes would be the best means of clarifying these fears entertained by prospective preference note purchasers.

Any conflicting statement or ambiguities that may be read into your recent letters can be cleared up by a balance sheet showing the new bonds sent you as active and the old bonds as dead. And if that is the meaning you intend to be accorded your letter of June 18th, it will be very easy for you to make this statement.

Very truly yours,

Pioche Mines Consolidated,
/s/ E. G. Woods, Secretary.

EXHIBIT DM-39

Fidelity-Philadelphia Trust Company
Philadelphia (9), Pennsylvania

Air Mail July 6, 1945

Pioche Mines Consolidated
Pioche, Nevada
Attention: Mr. E. G. Woods, Secretary

Gentlemen:

This is to acknowledge the receipt of your letter of June 27, 1945, wherein you make certain statements and ask certain questions.

While in your statements you indicate that you are of the opinion that our letters have not been clear, that there is uncertainty as to our present position and that we have imposed certain "unde-

fined requirements", we must deny that there exists any basis whatever for any such conclusions. Throughout our correspondence we have made every effort to be completely candid, to state our position with clarity and to convey to you our desire to discuss with your representatives any points which required clarification, pointing out that we believed it would be to our mutual advantage if a conference could be arranged so that the necessary details and such differences as might exist could be freely discussed and settled. We have always believed that if such a conference were had all of the questions which you may have would be promptly and satisfactorily settled. You have consistently refused to accept our suggestion that such a conference be had. We repeat that we believe it would be most helpful if either your counsel or someone representing your Company could arrange to meet with us or with our counsel so that such problems as you may think still exist can be satisfactorily and finally cleared.

However, in spite of your seeming unwillingness either to meet with us or have your counsel confer with our counsel so that real progress may be made without delay, we shall endeavor to answer again the questions which you put in your letter of June 27th.

This Company is both Trustee and Depositary. It has repeatedly stated its desire and intention to take every required step in the consummation of the Merger and Settlement Agreements and to do

all within its power to cooperate to that end. There has been no change in its position. There are no undefined requirements. In the bringing about of the objectives of the Merger and Settlement Agreements, there are certain steps which must be taken by this Company and there are certain steps which must be taken by others who are parties to those Agreements; certain of these steps must be taken by Pioche Mines Consolidated which is the principal party involved therein. If Pioche Mines Consolidated takes all of the steps which it is required to take under those Agreements, there is no question but that the old debenture bonds will be dead and there is no question but that the new income bonds sent to this Company in April of 1944 (and which this Company has accepted in exchange for the old bonds) will be valid obligations of the Company. In our opinion there should be no question at all but that all appropriate steps will be taken and that as a result no one will be in a position to raise any question about either the complete termination of any validity of the old bonds or the full life of the new bonds.

It follows that if your Company takes the steps required of it by the Agreement, the old bonds will give way to the sale of the preference notes. However, the only party who is able to answer the question as to whether your Company will perform its obligations is the Company itself. You and your counsel must supply the necessary certificates for your auditors.

We agree with your construction of the Settlement Agreement that all parties are obligated to assist in the sale of the preference notes. We do not agree that our letters have contained conflicting statements.

While we have not heretofore so suggested, it has been our belief that a pro forma balance sheet should have been prepared some time ago by your Company showing just what the effect of the reorganization will be and we believe that the preparation of such a balance sheet showing the status of the Company after the reorganization has been effected will be helpful to all parties.

There has been no reluctance on our part to give you a clear statement of our position. We have made every effort to write with clarity and we stand ready to confer with your representatives at any time. We have no doubt whatever but that if your Company performs its obligations under the Agreements, the new bonds will continue to be valid and the old bonds will be dead. The answer to the questions which you put depends entirely upon the procedure to be followed by your Company, the good faith of which we have assumed.

Very truly yours,

/s/ M. S. Altemose, Vice President

MSA:DH

EXHIBIT "B"

[Title of District Court and Cause No. 101.]

AFFIDAVIT IN SUPPORT OF MOTION FOR DEPOSIT IN COURT

State of Nevada, County of Lincoln, ss.

E. G. Woods, being first duly sworn deposes and says:—

That he is Secretary and Treasurer of Pioche Mines Consolidated, Inc., defendant in the above entitled case, and has been at all times since the commencement of this action;

That as such he is keeper of the accounts and records of said company and that he is familiar with the correspondence between said company and Fidelity Philadelphia Trust Company, Debenture Holders' Committee and Percy H. Clark during the period stated;

That he signed as Secretary at the order of the Board of Directors and at the order of the stockholders' meeting many of the letters which were sent to Fidelity Philadelphia Trust Company and Debenture Holders' Committee;

That at no time from July 15, 1943, the date of the commencing of the stockholders' meetings, which were called to vote upon the proposed merger, down to December 3, 1943, did said stockholders meetings have any satisfactory reply to the question of said meeting addressed to Debenture Holders' Committee and Fidelity Philadelphia Trust Company, asking which Debenture Holders had given their consent

to the terms of the Settlement Agreement as provided for in Paragraph VII thereof.

That at no time did the Directors' meeting receive a satisfactory statement from Fidelity Philadelphia Trust Company or Debenture Holders' Committee in conformity with which an issue of new securities could be made for their accounts without involving the company in an over issue of securities;

Affiant avers that all accounting and recording of any and all transactions in the books of the company kept at Pioche, Nevada, relating to the debenture issues of 1929 and 1930 were based upon information transmitted through correspondence from Percy H. Clark, as the officer in charge of Debenture Subscriptions. That said information contained in correspondence of Percy H. Clark is confusing, misleading, contradictory, inconsistent and incorrect.

That in the summer of 1939 an audit of the accounts of the company were conducted by the auditing firm of Barrow, Wade, Guthrie Company of Philadelphia at the insistence of the Pioche Debenture Holders' Committee. That Mr. George H. Lieb, Certified Public Accountant representing said firm, admitted to me that he found it impossible to determine the true status of the Debenture accounts from the information at hand and stated that upon his return to Philadelphia he would advise his firm of the necessity of an audit of the bond accounts kept by said Percy H. Clark as being essential to a complete audit of the accounts of the company, but

such audit of said accounts was never furnished us.

That in February, 1940, an attempt was made by defendant Pioche Mines Consolidated, Inc., to clear up the confusion and inconsistencies in the bond accounts of Percy H. Clark, who had theretofore had sole charge of requisitioning bonds and collecting therefor, and who had theretofore kept, and had charge of keeping, in Philadelphia, of all records pertaining to said bonds, by a demand made by said Pioche Mines Consolidated, Inc., upon said Percy H. Clark for an audit of his Debenture account but that such demand for an audit was refused by said Percy H. Clark.

Affiant also avers that Mr. Frank G. Shaw, Certified Public Accountant of the firm of Hartshorn and Walter of Boston, was retained to audit the accounts of defendant company for the stockholders' meeting held in Pioche on July 15, 1943. That it was impossible for said auditor to determine from information at hand that defendant company had received from Fidelity Philadelphia Trust Company or from Percy H. Clark the amount of Debentures which would be outstanding after the merger, and for that reason it became impossible for him to prepare a pro-forma balance sheet in time for presentation to the meeting of Stockholders of the company, which would represent accurately the debt structure of the new company if and when formed.

That information relating to debentures outstanding furnished to the firm of Hartshorn and Walter, auditors, by Percy H. Clark, in his letter to them of August 27, 1943, was not consistent with letters

written by Percy H. Clark to the company and others, for example:—

Clark letter to John Janney, dated November 27, 1936

Clark letter to John Janney, dated February 21, 1940

Clark letter to Richard E. Dwight, dated July 9, 1943.

Affiant further avers that Percy H. Clark letter to Fidelity Philadelphia Trust Company, depositary under Debenture Holders' Agreement, dated November 22, 1943, contains information contrary to that contained in his letter to Richard E. Dwight, the New York attorney for defendant company, of July 9, 1943.

That information relating to debentures contained in letter of Mr. Ringe of Morgan, Lewis & Bockius, Counsel for Fidelity Philadelphia Trust Company to Richard E. Dwight, Counsel for Defendant Consolidated Company, dated February 27, 1945, is not consistent with information contained in letter of Debenture Committee to Fidelity Philadelphia Trust Company under date of November 22, 1943.

That defendant, Pioche Mines Consolidated, Inc., repeatedly requested an audit of the debenture account but such audit was not furnished.

Attached hereto and marked Exhibit W 1 to 13 inclusive, are true copies of the letters, reference to which is heretofore had in this Affidavit.

That the deposit in this Court of the debentures claimed to be held by Fidelity Philadelphia Trust Company, together with the authority for holding

same would enable the accountants of said defendant Pioche Mines Consolidated, Inc., to determine what new securities can be issued without causing an over issue of securities.

/s/ E. G. Woods

Subscribed and sworn to before me this 18th day of October, 1947.

[Seal] /s/ Glenda P. Quirk,
Notary Public in and for the County of Lincoln, State of Nevada.

EXHIBIT W-1

Mr. John Janney November 27, 1936
551 Fifth Avenue, New York City.

Dear John—

I promised to send you a statement of the amount of debenture interest accumulated up to October 31, 1936, represented by scrip issued and overdue coupons not yet surrendered in exchange for scrip. I will take as my basis for making these figures the outstanding debentures as set forth in the old Prospectus, to-wit:

Debentures of the 1929 issue.....$416,300
Debentures of the 1930 issue.....$185,750

In the case of the debentures of the 1929 issue, the Company originally sold $419,600 of debentures, which were delivered to the subscribers. $3300 of these debentures have been converted into stock, leaving the $416,300 indicated. The Trustee has, in

addition, certified $60,000 of these debentures which are in the custody of the District National Bank but my information is to the effect that these debentures have never been pledged for any loan, although the Company owes a balance to the Bank.

The Trustee has certified and delivered to the Company $211,000 in face value of the debentures of the 1930 issue. The $185,750 of debentures mentioned in the prospectus are made up as follows:

Outstanding in the hands of the public	$161,000
Subscribed and paid for by Theodore Brown but never delivered because of failure to pay balance of $5000 subscription	2,250
Subscribed and paid for by Lee but never delivered because of failure to pay balance of $23,000 subscription	12,500
Pledged with Kansas City Structural Steel Company	10,000
Total	$185,750

The remaining $25,250 of debentures certified are debentures delivered to the Company, part of which have never been subscribed for and the balance of which are held against Lee's and Brown's unpaid subscriptions. Probably, it will never become necessary to issue scrip in payment of interest on the debentures pledged with the Kansas City Structural Steel Company and I do not know what adjustment will be made with Brown and Lee. With this explanation, I will make the interest calculations as follows:

As above indicated, the total amount of debentures outstanding is $602,050. Interest was first paid on the debentures of the 1929 issue in scrip on July 1, 1931 and there have been 11 interest payments made in scrip down to and including July 1, 1936, of 3½% each, a total of 38½%.

The same percentage applies to the debentures of the 1930 issue as the first interest payment was made in scrip on October 1, 1931 and the 11th and last was made on October 1, 1936.

38½% of $602,050 amounts to $231,789.25. This is the amount of scrip issued or issuable against overdue coupons down to and including October 31, 1936 but it does not include interest on the debentures of the 1929 issue accrued from July 1, 1936 to October 31, 1936, nor interest on the debentures of the 1930 issue from October 1, 1936 to October 31, 1936.

No debentures are issuable in denominations of less than $100 and there are no coupons of a denomination less than $3.50. The odd 25c in the interest calculation results from the fact that Theodore Brown has paid up $2250 of his subscription in cash and for the purposes of the calculation I am considering that he is entitled to the payment of interest in scrip.

I note that in the capitalization setup on page 8 and the balance sheet on page 10 of the old Prospectus, the amount of scrip outstanding is given as $208,150.69. I have been doing some figuring but have not been able to check the figure stated. The figure seems too high for the date July 31, 1935 on

any basis that I can imagine. It might be that the date of the Prospectus was used but this does not account for the figure set forth in the balance sheet dated July 31, 1935.

Very truly yours,

/s/ Percy H. Clark

PHC-W

[Printer's Note: Exhibit W-2 is a duplicate of PC-3 which is set out at page 292]

EXHIBIT W-3

December 5, 1942

551 Fifth Ave., Suite 1810, New York

Mr. Percy H. Clark,
1500 Walnut St. Bldg.,
Philadelphia, Pa.

Dear Percy—

I have to acknowledge receipt of copy of the long letter of November 28th, which you wrote to Mr. Richard E. Dwight.

As soon as the form of Merger Agreement can be set up in a manner satisfactory to the attorneys of all parties concerned, I am ready to submit same to the Board of Directors of the three companies in such final form as may be agreed upon, and meantime will be waiting with some impatience for this accomplishment.

I believe it was agreed at the meeting on October 23rd, in Mr. Dwight's office with you, Mr. Gerhard and Mr. Holden present, that the figures to go in the

agreement will conform to par. 1, Sec. a 2, of the Settlement Agreement——

> "The principal of all other debts justly owed by the company as certified by Mr. Woods and an independent accountant."

The Directors will start the work of the accountants as soon as possible after receiving the Merger Agreement in such definite form that it will not be affected by any subsequent changes or suggestions by the attorneys of any of the parties to the said Merger Agreement.

I believe it is my function as the President of two of these companies to leave the attorneys to work out the form of Merger Agreement. Nevertheless I am interested in your letter of the 28th to Mr. Dwight and thank you for sending me copy of same, and I have forwarded copy of it to Boston for the attention of the Boston Committee who are signers also to the Settlement contract and therefore entitled to a copy.

In connection with your letter to Mr. Dwight, I deem it important to call your attention to certain parts of your letter:—

I.

In par. 3 you say "the committee recognizes the matter of bringing in an independent accountant at this time is not deemed desirable by Mr. Janney because of additional expense and delays involved and for other reasons".

There was nothing said by me in the meeting on Oct. 23rd intended to give any such impression; on

the contrary it was agreed that we all desired to have an independent accountant to certify to the figures. I would now like to emphasize that it is still my desire, and ask that you correct any impression to the contrary which your letter of Nov. 28th may have occasioned.

II.

On page 5, par. 4, you say "Mr. Gerhard loaned Mr. Janney $10,000. early in 1930 which was turned over to the Pioche companies." The fact is that Mr. Gerhard did not loan me $10,000.

Mr. Gerhard had subscribed to $25,000 of Pioche Mines Consolidated debentures along with another member of the Philadelphia group of debenture holders with a view of making a profit out of the subscription. After a payment of $5000. on this subscription, Mr. Gerhard wishes to be relieved from the obligation of the remaining $20,000. A conference was held in your office between Mr. Gerhard the subscriber, Mr. Percy Clark the attorney for the Company and Mr. Janney, President of the Company.

The proposition considered was that Mr. Gerhard would loan the company $10,000. and then he would be released from his subscription. Mr. Clark and Mr. Janney both seemed to feel this was a fair arrangement and $10,000 was loaned by Mr. Gerhard to the Pioche Mines Consolidated (not to Mr. Janney) and the money was deposited in bank to the credit of the company.

It went on the books as a payment on Mr. Gerhard's subscription. To cover the transaction tem-

porarily until it would be finally ratified and approved, Mr. Janney asked Mr. Gerhard to take his personal note to cover the $10,000. The understanding was that this would be replaced by company note at the maturity which I believe was 90 days, upon request from Mr. Gerhard. Mr. Gerhard never made any request for replacement of company note.

The $10,000 was carried in the company's books as payment on Mr. Gerhard's bond subscription. At the time of Mr. Lieb's visit to Pioche, in going over the matter of payments on subscriptions, I happened to be present in the office at the time. Mr. Woods showed Mr. Lieb the item of $10,000 coming from Mr. Gerhard; as a result of this item, there was $10,000 overpayment to the debenture account in the company's books, as compared with statements received from yourself as the officer in charge of debenture subscriptions and keeper of the records pertaining thereto.

If this matter is not shown on Barrow, Wade, Guthrie & Co.'s statement it is not because the above information was not given to Mr. Lieb their agent, from the company's record of accounts at Pioche.

III.

As to certain other matters contained in your letter of November 28th which should be answered, I believe the attorneys are qualified to make reply to them.

I might add this one observation: I note the debenture-holders Committee is taking the position that the debenture holders who received interest in

cash up to July 1, 1930 are to be given a preference position, as against other creditors who did not collect interest up to that date.

I say I note this is to be the position of the debenture-holders Committee. I have nothing to say as to this position, except to say that a mistake was made in leaving this particular provision out of the final draft of the Settlement Agreement, which I did not see until after it had been submitted to the bondholders' Committee. I do not wish to make a point of this now, nor did I wish to make a point of it then,—I only wish to have a position taken by the debenture-holders' Committee with reference to it.

As to those stockholder-creditors who were not parties to the Settlement Agreement, this becomes a matter of inequity that will have to be adjusted by some one assuming the burden of these payments to such an extent as will reinstate the equity of their position. This can be arranged.

IV.

As to Pre-Trial conference questions, these were duly answered and a number of copies sent to our attorneys in Reno for proper service and distribution.

Five copies of these papers were sent to the attorneys in Reno in time to arrive there May 19th and their arrival on that date was duly acknowledged.

Very truly yours,

/s/ John Janney

EXHIBIT W-4

551 Fifth Avenue, Suite 1810, New York

Mr. Albert P. Gerhard, February 13, 1943
1930 Land Title Bldg., Philadelphia, Pa.

Dear Mr. Gerhard—

With further reference to your letter of December 10, 1942, in which after suggesting that the Kansas City Structural Steel Co. bonds when released could be paid over to you, you say:

> "It seems to me that it does not make much difference whether I receive the note or the bonds, as in either case I would receive new income bonds for the principal amount and stock for the interest."
>
> "I would like to know definitely, however, which way this $10,000. payment made by me is going to be handled."

I am now in position to advise that the auditor has recommended that inasmuch as the $10,000, which was paid in by you shows as a deposit made on June 8, 1931 to the account of the company with E. W. Clark & Company, bankers, and since this entry was included among other payments on bond subscriptions, it would be the proper solution for this problem to cover this transaction in a certificate setting it up under "contingent and other liabilities". This liability is to be discharged in conformity with Settlement Agreement by the delivery to you of $10,000. of bonds just as if you had received the bonds for the subscription payment.

The bonds would be delivered to you upon the delivery to me of the note you hold for $10,000. signed by myself to your order. As this is in accordance with your letter of December 10th, and in accordance with Mr. Dwight's suggestion that the matter should be left to the auditor to determine, I presume this will be a satisfactory settlement and would like to have you advise me as to your wishes in the matter.

Very truly yours,

/s/ John Janney

EXHIBIT W-5

Mr. Richard E. Dwight, July 9, 1943
100 Broadway, New York

My dear Mr. Dwight:

This will acknowledge receipt of your letter of the 7th.

I think I have already sent you piecemeal nearly all of the information you want, but this letter will consolidate the information in form to be presented to your auditors.

You will find enclosed original certificate of Fidelity-Philadelphia Trust Company dated April 12, 1943 certifying information as to the outstanding debentures which shows $687,300. of debentures to be outstanding. The difference between the $602,050 of bonds shown on the balance sheet as outstanding and the $687,300 shown by the Fidelity's certificate is made up as follows:

Held by District National Bank, for account of the Company	$60,000
Subscribed for by Gerhard and certified and delivered to E. W. Clark and Co., but not taken up by Gerhard	10,000
Subscribed for by Faraley and delivered to E. W. Clark & Co. but subscription cancelled	2,000
Part of $25,000 subscribed for by Lee and delivered to E. W. Clark & Co. and not paid for—to the extent of	10,500
Part of $5,000 subscribed for by Brown and delivered to E. W. Clark & Co. but not paid for—to the extent of	2,750
	$85,250

The $602,050. of bonds shown as outstanding on the balance sheet does not include the $10,000. of bonds subscribed for by Albert Gerhard. The figure appearing in Seventh 1. (a) of the Merger Agreement should have been changed to $612,050. when we agreed to include Albert Gerhard as one of the debenture holders. The $10,000 of bonds held as collateral by the Kansas City Structural Steel Company are included in the $602,050. figure, and if Mr. Janney arranges to have them surrender for cancellation, the $602,050. figure in the Merger Agreement will be sufficient to include Gerhard's bonds.

You will find attached hereto a copy of a letter addressed by E. W. Clark & Co. to Hartshorn and Walter in Pioche certifying to certain facts relating to E. W. Clark & Co.'s loan and the bonds which that firm holds as collateral. According to my understanding the $602,050. of bonds shown on the balance sheet includes the amounts paid by Brown and Lee on account of their subscriptions, but does not include the unpaid balance of the subscriptions not paid as shown on theabove tabulation, nor does

this figure include the Gerhard and Fraley bonds. It does include the $10,000 of bonds pledged with Kansas City Structural Steel Company.

The following is a statement of bonds which have assented to the plan:

Deposited with Fidelity-Philadelphia Trust Company under Debenture-Holders' Agreement			$530,100
Assents secured by Debenture-Holders' Committee:			
	1929	1930	
Estate of Charles Wheeler, dec'd	$10,000	$10,000	
Wm. Innes Forbes		5,000	
Harry D. Belt		1,000	
Estate of James Crosby Brown	3,000		
Oliver H. Cover (Hodgson)	1,000		
Heyward E. Boyce (Naylor)	5,000		
Walter L. Rogers	1,000		
Stuart Farrar Smith	5,000		
Ivan F. Goodrich	100		
Estate of E. T. Stotesbury	10,000		
Elizabeth Stanley Trotter	10,000		
Grace T. Whitney	1,000		
Estate of Mary S. Thayer		5,000	
	$46,100	$21,000	67,100
			$597,200
Consents secured by John Janney as set forth in his letter of March 12 to you:			
	1929	1930	
Gilbert R. Payson (Estate of Charles E.)	$ 500		
Lawrence R. Lee	10,000		
Estate of Grace T. Train	1,500	$ 1,000	
Margaret P. Chew (Estate of Roger Chew)	1,000		
Estate of Otto U. Von Schrader	2,500		
Elliot A. Hunt	1,000		
District National Bank	60,000		
Kansas City Structural Steel Co		10,000	
	$76,500	$11,000	87,500

Non-assenting debenture-holders:	1929	1930	
A. J. Harper		$ 1,000	
Hooper S. Miles	$ 100		
Samuel L. Munson		500	
Mary Tancred	500		
Estate of Dr. Landis	100		
George B. Page	400		
	$ 1,100	$ 1,500	2,600
			$687,300

I have included Grace T. Whitney, $1,000., under heading of assents secured by the Debenture-Holders' Committee. Mr. Naylor saw Mr. Whitney several times and the latter arranged that Mrs. Whitney would send her assent to John Janney.

I have included under consents secured by John Janney the bonds held by District National Bank, $60,000., and Kansas City Structural Steel Company, $10,000., although he has not advised that these consents have actually been secured. On the other hand I have not included the Brown and Brooks bonds which Mr. Janney mentions in his letter because these bonds are already deposited with Fidelity and are included in the $530,100 figure.

Concerning the non-assenting debenture-holders, I have the following information:

Harper, $1,000.—This bond is now held in an estate of which I understand Mr. Harper's two brothers are executors. Mr. Naylor has seen one of the brothers several times. They would like to sell their bonds.

I have no information about Miles $100.

The Munson $500. bond is lost.

John Janney has indicated he is following up

Tancred, $100. Mary Tancred was Mr. Von Schrader's cook. She died and the bond is now held by the Davenport Iowa Trust Company presumably in her estate.

Landis, $100.—I believe this bond will come in if the plan goes through.

Page, $400.—I talked with George Page and he has promised to drop in at this office. I believe the only thing that prevents him from depositing his bond is inertia.

I hope this will give you the information you want.

In view of the short length of time before the meeting, I am mailing a copy of this letter and enclosures airmail to Mr. Woods in Pioche, I spoke to your secretary about this and she thought it would be a good idea.

Very truly yours,

/s/ Percy H. Clark

EXHIBIT W-6

Mr. Percy H. Clark, August 2, 1943
1500 Walnut Street Bldg., Philadelphia, Pa.
Dear Sir:

The auditor wishes additional information of your accounting of the bond transactions conducted under your authority as Vice-President. This information is made necessary by conflicting statements brought to our attention by the auditor, which are contained in various letters from you to us and to Mr. Dwight.

1. For our records we would like to know under what authority you acted in the deposit of the bonds of L. R. Lee, with E. W. Clark and Co., as collateral

to a company note. Also authority for the use of the bonds of Theodore E. Brown and Albert P. Gerhard. Our records show that you had authority for the deposit of the bonds that were not paid for, and no authority for the bonds that were paid for.

2. Referring to Albert Gerhard's subscription, our records show deposit was made by you in E. W. Clark and Co., on June 8th, 1931, of $10,000.00. This deposit was credited on our books in the absence of advice from you to the contrary under bond subscriptions. Nothing but deposits from bond subscriptions were made to the E. W. Clark Bankers account at that time. Your letter of July 9th seems to conflict with this when you say Gerhard paid his subscription "in the form of a loan to John Janney".

If the payment of $10,000 by Albert Gerhard was deposited to the company's credit with E. W. Clark and Co., on June 8th, 1931, this could not be a loan to John Janney as stated in your letter.

3. As to the matter of $602,050. being the amount of bonds issued:

(a) With reference to Albert Gerhard's subscription, raising the amount to $612,050. the Board of Directors never approved the cancellation of Albert Gerhard's unpaid subscription. In fact the Board of Directors never received a recommendation from the company's attorney advising that the rights of other subscribers did not make it ill advised to release unpaid subscriptions without reference to the rights of other subscribers. Therefore the 10,000 additional bonds to Albert Gerhard are to be paid by

the merged company, and after the merger is completed, and as a settlement of this account.

(b) With reference to Kansas City item: In your letter of July 22nd you state that the Kansas City $10,000 bonds are outstanding. In previous reports you show these bonds were used as collateral security to the note of the Kansas City Company. How do you reconcile these statements?

4. In previous letters you make a statement which we wish to point out is incorrect, wherein you say that in a certificate attached to Mr. Simon's audit of February 7, 1943, Mr. Janney and Mr. Woods report certain obligations of the company, not shown on the books. You should be advised for the record that all obligations of the company were shown on the books of the company, and that the certificates you have incorrectly quoted refers to items agreed to be paid in the settlement agreement. They were not obligations of the company at the time of the audit, nor will they be obligations of the merged company until the Settlement Agreement is approved by stockholders' meeting and papers filed.

5. There are other conflicting statements in your various reports which make it difficult to audit the bond account, and it would appear that the best procedure would be for you to submit a complete statement, duly certified, of your handling of the bond issues of this company from the beginning down to the date of your tendered resignation, giving in detail as footnotes such explanations to the transactions as would appear necessary or advisable.

We have never had an audit of your account and what we wish is something from you that we can consider a final and complete statement, and which we could use in lieu of an audit.

Very truly yours,

/s/ E. G. Woods, Secretary

EXHIBIT W-7

Clark, Hebard & Spahr
Philadelphia 2, Pa.

E. G. Woods, Secretary August 10, 1943
Pioche Mines Consolidated, Inc., Pioche, Nevada
My dear Mr. Woods:

This will acknowledge receipt of your letter of August 2 which came by this morning's mail. Mr. Janney can give you the answer to practically all of these questions which, however, I will answer briefly as follows:

1. The company's note was given to E. W. Clark and Co. and the debentures of Lee, Brown and Gerhard were deposited with E. W. Clark and Co. pursuant to authority given to me in writing by John Jannet. I know nothing about your records but the authority from Janney is definite.

2. I know that Albert Gerhard signed a subscription for $10,000 of debentures and sent me his check with instructions to deposit it to the credit of the company. I have never been advised as to how this matter was treated on the company's books. My statement that Gerhard put his subscription "in the form of a loan to John Janney" is based on information given to me by John Janney and Albert

Gerhard. This is an accounting matter arising out of the side arrangement made by Janney with Gerhard undisclosed at the time.

3.(a) Whatever way the accountants want to treat Albert Gerhard's $10,000 advance makes little difference provided he gets the new securities to which he is entitled as agreed.

(b). The Kansas City bonds were certified and delivered by the trustee in accordance with instructions from the company. They have never been returned to the trustee and the trustee's records, therefore, show them as outstanding bonds and they must be so considered until returned to the trustee for cancellation. I understand the $10,000. of bonds alleged to have been pledged with Kansas City Structural Steel were included in the $602,050 bonds certified as outstanding by Mr. Simon in the balance sheets attached to the prospectuses registered with S.E.C.

4. This is unimportant but you will find that Mr. Simon in his certificate of February 7, 1943 referred to the obligations in question as "Liabilities not reflected on the books of the company" I understand the directors of the company have approved the Settlement Agreement which recognizes these liabilities.

5. I have already submitted full information to the company, and this is an auditing matter to be handled by the accountants.

Very truly yours,

/s/ Percy H. Clark

PHC-mac

EXHIBIT W-8

Northeast Harbor, Maine
Messrs. Hartshorn & Walter, August 27, 1943
50 Congress Street, Boston, Massachusetts

Gentlemen:

This will acknowledge receipt of your letter of August 12th.

I do not think Fidelity Philadelphia Trust Company knows the amount of Debentures that have been paid for. It certified the Debentures that are outstanding on the basis of written orders delivered to it in accordance with the Trust Agreements but did not have anything to do with the cash paid for Debentures.

I did not handle either the Debentures or the cash paid for them but had general supervision over those parts of the transaction that were handled by Fidelity and E. W. Clark & Co.

E. W. Clark & Co. were engaged in a general banking business at the times when the Debentures were sold and subscriptions to Debentures of both issues were made payable in instalments at the office of that firm. The Debentures that had been subscribed for were certified by Fidelity from time to time and delivered to E. W. Clark & Co. which issued its receipts for instalment payments as received and delivered the Debentures to the subscribers as they respectively paid their final instalments.

Debentures of the 1929 issue to the total amount of $419,600. were duly certified by Fidelity and delivered to E. W. Clark & Co. and subscriptions to

the same amount were paid in full and the Debentures delivered to the subscribers. The full amount of cash received from subscriptions was deposited with E. W. Clark & Co. to the credit of Pioche Mines Consolidated, Inc. which had opened a deposit account with that firm. These figures have been verified by E. W. Clark & Co. At a later date $3,300. of Debentures of the 1929 issue were converted into stock and on July 8, 1942 Debentures which had been sold for cash were still outstanding to the amount of $416,300., as certified by Fidelity.

At the time of the sale of Debentures of the 1930 issue an additional $60,000. of Debentures of the 1929 issue were certified by Fidelity on a written order signed by me (I think) and sent by registered mail to The District National Bank of Washington, D. C. This was done at the request of John Janney.

I have been advised by Fidelity that when these $60,000 of Debentures of the 1929 issues were sent to The District National Bank their maturity date was January 1, 1934, they have never been extended, none of the coupons have ever been presented to Fidelity for payment nor have coupons maturing subsequent to January 1, 1934 ever been attached to these Debentures as in the case of other Debentures of this issue. These Debentures are included in the $476,300. of Debentures of the 1929 issue which Fidelity has certified to be outstanding as of July 8, 1942.

The facts relating to the Debentures of 1930 are somewhat more complicated. John Janney took personal charge of securing subscriptions and all of them have not been fully paid so far as my records

show and I think he is the only person who can supply the information missing from the following statement.

As in the case of Debentures of 1929, subscriptions to the Debentures of 1930 were payable in instalments at the office of E. W. Clark & Co. and were not to be binding until $250,000. of Debentures had been subscribed for. Janney succeeded in securing subscriptions to something over $150,000. He then seemed unable to secure any further subscribers in Philadelphia and went to Washington. In a few days he returned with new subscriptions signed by himself for $50,000. and by Lawrence R. Lee for $25,000. This left them a little less than $25,000. short of the minimum amount required to bind subscribers and John Zimmermann, Charles Wheeler and I then underwrote this amount in consideration of a stock commission and with the promise by Janney that he would place these Debentures and thereby relieve us of the subscription.

Subscriptions were called for payment at the office of E. W. Clark & Co. Janney stated he would pay his $50,000. direct to the Company, treat the matter as he had treated previous advances and it would not be necessary to issue Debentures to him. Fidelity certified and delivered $200,500. of Debentures to E. W. Clark & Co. in accordance with the Trust Agreement. Subsequently John Janney requested that $10,000. of Debentures of the 1930 issue be certified and delivered to Kansas City Structural Steel Co., a credit of Pioche Consolidated, to be held as collateral for the amount due. So far as I know, the Company received no cash for the Debentures so

pledged. At the time these Debentures were certified and sent to Kansas City Structural Steel their maturity date was October 1, 1937—they have never been extended, none of the coupons attached have ever been presented to Fidelity for Payment, nor have coupons maturing subsequent to October 1, 1937 ever been attached to them, as in the case of other Debentures of this issue. These Debentures are included in the $211,000. of Debentures of the 1930 issue which Fidelity has certified to be outstanding as of July 8, 1942; also a $500. Debenture certified and delivered to Janney for the account of an engineer named Munson, in payment for services rendered. I have been told Munson is dead and his wife was unable to find the Debenture which presumably is lost.

The Debentures of the 1930 issue can be accounted for as follows:

Subscriptions paid in full, Debentures delivered to subscribers and still outstanding		$160,500
Subscriptions paid in part only and Debentures not delivered to subscribers:		
Theodore E. Brown paid on account of $5000 subscription		2,250
Lawrence R. Lee paid on account of $25,000 subscription		12,500
Lee sold $2,000 of the Debentures for which he had not paid in full which were credited on account of his subscription, thus reducing the amount unpaid by him to $10,500. The $2,000 paid for the Debentures he sold is included in the $160,500 figure above.		
Dr. Frederick Fraley subscribed for $2,000 of these Debentures but was subsequently released from his subscription and the bonds were held by E. W. Clark & Co.		2,000
Debentures delivered to Kansas City Structural Steel Co.		10,000
Debentures delivered to Munson		500
Unpaid balance of part paid subscriptions:		
Lawrence R. Lee	10,500	
Theodore E. Brown	2,750	13,250

Debentures subscribed for by Gerhard but not delivered to him because of a collateral arrangement made between him and Janney involving the loaning of the money to Janney on his individual obligation. The money, $10,000, was paid by Gerhard to E. W. Clark & Co. but that firm, pursuant to Gerhard's request, did not deliver the Debentures to him. The $10,000 is not included in the $160,500 above. The arrangement between Gerhard and Janney was reduced to writing and I feel sure Gerhard will be glad to send you a copy if you desire to inspect it 10,000

Total outstanding Debentures of 1930 issue as certified by Fidelity $211,000

The above table shows that cash was paid on account of subscriptions to Debentures of the 1930 issue as follows:

Those who paid subscriptions in full	$160,500
Brown and Lee in part payment of their subscriptions	14,750
Gerhard in satisfaction of his subscription but pursuant to his separate arrangement with Janney	10,000
Total cash paid to E. W. Clark & Co. on account of subscriptions to Debentures of 1930	$185,250

Subscriptions not paid:

Fraley	$ 2,000	
Brown	2,750	
Lee	10,000	
		15,250
Janney's subscription		50,000
Total		$250,500

The total amount of Debentures paid for in cash to my knowledge, is:

Debentures of 1929	$419,600
Debentures of 1930	185,250
	$604,850

The above answers your question to the extent I can answer it. However, the following may be helpful to you:

Zimmermann, Wheeler and I paid in full the $25,000. of subscriptions underwritten by us and these amounts are included in the $160,500. of subscriptions paid in full.

I relief upon Janney to pay his $50,000. direct to the Company in the manner above stated and considered this would constitute satisfaction of his subscription obligation. No debentures have ever been issued on account of his subscription.

The Debenture-holders' Committee recently gave Janney the choice of classifying Gerhard as a Debenture-holder or as one of the other creditors for the purpose of these Agreements. He elected to include him as one of the class of Debenture-holders. The $10,000 of Debentures issued on account of his subscription and pledged with E. W. Clark & Co. will be freed from the pledge when the amount due that firm is paid.

The Debentures certified and delivered to E. W. Clark & Co. but not delivered by that firm to subscribers, to wit:

Lee $25,000 less $2,000 sold	$23,000
Brown	5,000
Fraley	2,000
Gerhard	10,000
Total	$40,000

were pledged under a collateral demand note for $3.700. given by Pioche Consolidated to E. W. Clark & Co. for cash advanced. The unpaid subscriptions of Lee and Brown were also pledged. The note was subsequently reduced to $2,000. and interest paid to September 30, 1937.

These debentures ($40,000) have been deposited with Fidelity under the Debenture-holders' Agreement of February 1, 1939 and E. W. Clark & Co. holds Fidelity's non-negotiable receipt for collateral deposited.

Any additional information concerning the payment of Janney's $50,000 subscription, and other subscriptions, should be secured from the books and records of the company and Janney himself.

The information given above is, I think, all to be found in the files of Pioche Consolidated and without doubt repeats facts with which you are already familiar. I have tried to write a complete account in order to avoid further delays.

I am sending this letter to Philadelphia to be checked, rewritten and returned to me for signature.

Very truly yours,

/s/ Percy H. Clark

PHC:M mac

EXHIBIT W-9

November 22, 1943

Fidelity-Philadelphia Trust Company, Depositary under Debenture-Holders' Agreement dated as of February 1, 1939

135 South Broad Street,
Philadelphia 9, Pa.

Gentlemen:

Fidelity-Philadelphia Trust Company as trustee under the two Pioche Mines Consolidated, Inc. trust agreements has advised the undersigned Committee

there are outstanding under the trust agreement dated January 2, 1929, $476,300. of debentures and under the trust agreement dated October 1, 1930, $211,000. of debentures, a total of $687,300. of debentures.

Fidelity-Philadelphia Trust Company as depositary under the Pioche Debenture-Holders' Agreement dated as of February 1, 1939 has advised the Committee that $399,100. of debentures outstanding under the trust agreement dated January 2, 1929 and $198,500. of the debentures outstanding under the trust agreement dated October 1, 1930, a total of $597,600. of debentures, have been deposited with Fidelity as depositary under said agreements.

Copies of the Pioche Settlement Agreement dated as of July 8, 1942, and of the Pioche Merger Agreement dated as of October 23, 1942, have been filed with Fidelity, all parties desire that the reorganization provided for by said settlement and merger agreements shall be consummated prior to December 31, 1943 and Pioche Consolidated has requested both Fidelity as depositary and the undersigned Committee to furnish it with a list of the names and addresses of those who have deposited debentures with Fidelity as depositary giving the amounts of income bonds and shares of stock to be issued to them respectively in exchange for their debentures upon the completion of the reorganization immediately after the consumation of the merger as provided in the Settlement and Merger Agreements.

The Merger Agreement provides for the issue of only $602,050. of income bonds against the de-

posited debentures. The amount of the outstanding debentures to wit: $687,300. exceeds by $85,250. the amount of income bonds to be issued as provided by the agreements. This discrepancy is to be reconciled by the surrender by Pioche Consolidated at the closing of $70,000 of debentures (those held by District National Bank and Kansas City Structural Steel Company) for cancellation against which no new securities will be issued and by the surrender to Fidelity as depositary of the non-negotiable receipt for $40,000. of deposited bonds now held by E. W. Clark & Co. This receipt is held as collateral for a loan which is to be paid by Pioche Consolidated at the final closing. Of the $40,000 of bonds represented by this receipt, $15,250. are to be cancelled without the issuance of any new securities. This cancellation together with the cancellation of $70,000, of bonds surrendered as above will reconcile the apparent discrepancy between the amount of outstanding debentures and the amount of income bonds to be issued under the agreements.

Upon the payment of this loan the balance of the debentures represented by the non-negotiable receipt outstanding in the name of E. W. Clark & Co. will be credited to the following parties.

Laurence R. Lee, Leesburg, Va.	$12,500,
Theodore E. Brown, Brush Hill Road, Milton, Mass.	2,250.
Albert P. Gerhard, 1930 Land Title Bldg., Philadelphia, Pa.	10,000.
	$24,750.

These parties upon the consummation of the reorganization will be entitled to income bonds and shares of stock of surviving company on the same terms and conditions as other owners of deposited debentures.

The cancellation of $15,250. of debentures represented by the non-negotiable receipt issued by Fidelity as depositary in the name of E. W. Clark & Co. will reduce the amount of deposited debentures against which income bonds and shares of stock of surviving company are to be issued to $582,350. There remain undeposited debentures outstanding to the amount of $19,700. together with scrip and coupons appertaining thereto, the holders of which have approved the settlement provided for in the Settlement and Merger Agreements and which are to be surrendered by Pioche Consolidated for cancellation by Fidelity as trustee at the time of the final closing. It is the understanding of the Committee that surviving company will issue the income bonds and shares of stock, to which the owners of these debentures are entitled, directed to them. This will be satisfactory to the Committee although the agreements provide the shares of stock of surviving company shall be delivered to Fidelity for the account of outstanding debentures.

It will be noted that income bonds are not issuable in any denominations less than $100. This will meet the requirements of all the holders of deposited debentures except Theodore E. Brown who paid only $2,250. on account of his subscription to $5,000. of debentures. He will also be entitled to a fraction of

a share of stock. This is a matter to be adjusted by Pioche Consolidated with Mr. Brown.

Based on the facts as above set forth, there has been prepared at the direction of this Committee, a list of the names and addresses in which the $582,-350. of income bonds and the shares of stock appertaining thereto as provided in the Settlement and Merger Agreements shall be issued, copies of which list are enclosed.

This letter is requested Fidelity-Philadelphia Trust Company as depositary to mail the list of names and addresses above referred to Pioche Mines Consolidated, Inc., Pioche, Nevada, immediately together with a copy of this letter.

This will also authorize Fidelity as depositary to deliver all of the deposited debentures, coupons and scrip to Fidelity-Philadelphia Trust Company, trustee under the above mentioned trust agreements, for cancellation upon the receipt by Fidelity of written instructions from the undersigned Committee that the terms and conditions of the settlement agreement have been fulfilled.

In our opinion, it will be necessary to have a closing settlement in Carson City or Reno immediately after the consummation of the merger or contemporaneously therewith for the consummation of the reorganization. At this settlement the debentures, coupons and scrip not already delivered to the trustee as well as all other outstanding obligations shall be delivered for cancellation.

Committee's attorneys are in correspondence with Messrs. Dwight, Harris, Koegel and Caskey repre-

senting other parties at the litigation and settlement agreement relating to details of the settlement. You will be advised further concerning these details as soon as these attorneys arrange them.

It is anticipated that these arrangements will provide that the written instructions from the undersigned Committee above referred to will be forwarded to Committee's representative at the closing settlement for delivery to the trustee or its representative at the proper time in the proceedings.

Very truly yours,

Pioche Debenture Holders' Committee

By .....

PHC;mac

EXHIBIT W-10

Requisition for Issuance of New Income Bonds and Common Stock of Pioche Mines Consolidated, Inc., for Delivery to Holders of Convertible Debentures Dated January 2, 1929 and October 1, 1930, Deposited With Fidelity-Philadelphia Trust Company Under Pioche Debenture-Holders' Agreement Dated as of February 1, 1939, Upon Consummation of Reorganization of Old Company.

Name and Address	Deposited Debentures	New Income Bonds	Denominations	*Shares of Common Stock
Helen F. Brinley, Montgomery Ave., Chestnut Hill, Philadelphia, Pa.	$ 1,000	$ 1,000	1 at 1M	1,650
Francis F. Brockie, c/o The Pennsylvania Co. for Ins. on Lives and Granting Annuities, 15th & Chestnut Sts., Philadelphia..	500	500	1 at $500	825
Henry G. Brooks, Public Service Bldg., 60 Batterymarch St., Boston, Mass.	2,500	2,500	2 at 1M 1 at $500	4,125

Name and Address	Deposited Debentures	New Income Bonds	Denominations	*Shares of Common Stock
Brown Bros. Harriman & Co., 1531 Walnut St., Philadelphia..	2,000	2,000	2 at 1M	3,300
Chellowe Corporation, c/o First National Bank, Philadelphia....	10,000	10,000	10 at 1M	16,500
Estate of Clarence M. Clark, Deceased, 1531 Locust St., Philadelphia, Pa.	10,000	10,000	9 at 1M 10 at $100	16,500
Frank T. Clark, c/o E. W. Clark & Co., 1531 Locust St., Philadelphia, Pa.	5,000	5,000	5 at 1M	8,250
Eleanor F. Clark, c/o Arthur S. Sinkler, Lancaster, Pa.....	200	200	2 at $100	330
Joseph S. Clark, 1531 Locust St., Philadelphia, Pa.	20,000	20,000	2 at 10M	33,000
Joseph S. Clark, Jr., 1320 Packard Bldg., Philadelphia, Pa.....	2,000	2,000	2 at 1M	3,300
Eckley B. Coxe, 3rd, 1421 Chestnut St., Philadelphia, Pa.....	2,000	2,000	2 at 1M	3,300
Jacob S. Disston, Jr., c/o Liberty, Title & Trust Co., Philadelphia, Pa.	5,000	5,000	5 at 1M	8,250
Fidelity-Philadelphia Trust Co., Depositary 135 South Broad Street, Philadelphia, Pa.	116,250	116,250	1 at $50 7 at $100 1 at $500 45 at 1M 7 at 10M	306,826
Fidelity-Philadelphia Trust Co., Robert Dechert, Surviving Executors of the Will of Alan D. Wilson, dec'd, 135 S. Broad St., Philadelphia, Pa.	100	100	1 at $100	165
Frederick Fraley, City Line, Overbrook, Phila., Pa.	2,000	2,000	2 at 1M	3,300
Donald McKay Frost, 84 State St., Room 601, Boston, Mass.....	2,000	2,000	2 at 1M	3,300
Albert P. Gerhard, 1608 Walnut St., Philadelphia, Pa.....	50,000	50,000	5 at 10M	82,500

Name and Address	Deposited Debentures	New Income Bonds	Denominations	*Shares of Common Stock
H. P. Glendinning, c/o Glendenning & Co., 123 S. Broad St., Philadelphia, Pa.	1,000	1,000	1 at 1M	1,650
Dr. Charles J. Hatfield, c/o The Henry Phipps Inst., 7th & Lombard Sts., Philadelphia, Pa.	500	500	1 at $500	825
Robert F. Holden, 1528 Walnut St., Philadelphia, Pa.	5,000	5,000	5 at 1M	8,250
R. H. Knode, 2500 Fidelity-Phila. Tr. Bldg., Philadelphia, Pa.	2,500	2,500	2 at 1M 1 at $500	4,125
Edward B. Leisenring, Fidelity-Phila. Tr. Bldg., Philadelphia	5,000	5,000	5 at 1M	8,250
Frank H. Maguire, c/o Glendinning & Co., 123 S. Broad St., Philadelphia, Pa.	3,000	3,000	3 at 1M	4,950
Joseph B. Mayer, Apt. 12F, 270 Park Ave., New York, N. Y.	5,000	5,000	5 at 1M	8,250
Francis F. Milne, Jr., Devon, Pa.	8,000	8,000	8 at 1M	13,200
J. Kearsley Mitchell, Bryn Mawr, Pa.	25,000	25,000	2 at 10M 5 at 1M	41,250
F. Corlies Morgan, Germantown Trust Co., Exr. Germantown & Chelton Ave., Philadelphia, Pa.	10,000	10,000	1 at 10M	16,500
Samuel W. Morris, c/o Girard Trust Co., Philadelphia, Pa.	25,000	25,000	2 at 10M 5 at 1M	41,250
F. Eugene Newbold, 1517 Locust St., Philadelphia, Pa.	2,500	2,500	2 at 1M 1 at $500	4,125
Virginia C. Newbold, 1517 Locust St., Philadelphia, Pa.	1,900	1,900	1 at 1M 1 at $500 4 at $100	3,135
Virginia Newbold, c/o The Penn. Co. for Ins. on Lives and Granting Annuities, 15th & Chestnut Sts., Philadelphia, Pa.	600	600	1 at $500 1 at $100	990
Isaac W. Roberts, Belmont Ave., Bala Cynwyd, Pa.	5,000	5,000	5 at 1M	8,250
T. Williams Roberts, 1012 Land Title Bldg., Philadelphia, Pa.	5,000	5,000	5 at 1M	8,250

Name and Address	Deposited Debentures	New Income Bonds	Denominations	*Shares of Common Stock
Nicolas G. Roosevelt, c/o W. H. Newbold Son & Co., 1517 Locust St., Philadelphia, Pa.	10,000	10,000	1 at 10M	16,500
Hugh D. Scott, c/o Old Colony Trust Co., 17 Court St., Boston	2,000	2,000	2 at 1M	3,300
Mrs. Conroy Clark Sinkler, Lancaster, Pa.	300	300	3 at $100	495
Paul C. Wagner, Paoli, Pa.	5,000	5,000	5 at 1M	8,250
Miriam C. Wallis, c/o Philip Wallis, Esq., 1429 Walnut St., Philadelphia, Pa.	500	500	1 at $500	825
Henry M. Watts, c/o Glendinning & Co., 123 S. Broad St., Philadelphia, Pa.	3,000	3,000	3 at 1M	4,950
Ezra B. Whitman, West Biddle St. at Charles, Baltimore, Md.	1,000	1,000	1 at 1M	1,650
David E. Williams, Jr., 1416 Chestnut St., Philadelphia, Pa.	5,000	5,000	5 at 1M	8,250
Willoughby Co., 15th Flr., 1500 Walnut St., Philadelphia Pa.	115,000	115,000	11 at 10M 5 at 1M	189,750
Sarah A. F. Zimmermann, 1401 Arch St., Philadelphia, Pa.	40,000	40,000	4 at 10M	66,000
E. W. Clark & Co., 16th & Locust Sts., Philadelphia, Pa.	40,000	40,000	4 at 10M	66,000
H. Gates Lloyd and Richard W. Lloyd, Trustees, c/o Drexel & Co., 1500 Walnut St., Philadelphia, Pa.	15,000	15,000	1 at 10M 5 at 1M	24,750
Anderson & Co., 135 South Broad Street Philadelphia, Pa.	10,000	10,000	8 at 1M 3 at $500 5 at $100	16,500
Part of Debentures deposited by E. W. Clark & Co., authorized to be cancelled	15,250	0		0
Totals	$597,600	$582,350		1,075,891

* Certificates for shares of Common Stock to be issued in denomina-

tions matching denominations of new Income Bonds requested to be issued at rate of 165 shares for each $100 Debenture.

Fidelity-Philadelphia Trust Company, Depositary
By H. W. Latimer, Assistant Secretary

November 22, 1943

EXHIBIT W-11

Hartshorn and Walter, Accountants and Auditors
50 Congress St., Boston, Mass.

John Janney, President February 15, 1944
Pioche Mines Consolidated, Inc., Pioche, Nevada

Dear Mr. Janney:

We have received a letter signed by Mr. Percy H. Clark, Chairman of the Pioche Debenture-Holders' Committee, in reply to our request for a definite figure representing the face amount of debentures which the Committee represents which have consented to the settlement agreement. We quote his reply below:

"This will acknowledge receipt of your letter of February 10, 1944. The face amount of debentures of Pioche Consolidated which our Committee represents which have consented to the Settlement Agreement is $597,600. I trust this is the information you require."

For your information, we submit a reconciliation of this amount with the amount shown on the list of consenting debenture holders which we understand you have received from Mr. Clark.

Debentures represented by the Committee which have consented		$597,600.00
Deduct,—Unpaid subscriptions pledged with E. W. Clark & Co. as collateral for a loan represented by debentures deposited by the Committee with Fidelity-Philadelphia Trust Co.:		
Laurence R. Lee	$10,500.00	
Dr. Frederick Fraley	2,000.00	
Theodore E. Brown	2,750.00	15,250.00
Total per list of Consenting Debenture Holders		$582,350.00

This information may be further summarized as follows:

Consents secured by Committee	$582,350.00
Consents secured by John Janney	17,500.00
Debenture Holders whose consents have not been secured	2,200.00
Total	$602,050.00

We will await your repy before proceeding with the preparation of the pro-forma balance sheet and financial statements in final form.

Very truly yours,

/s/ Hartshorn and Walter

EXHIBIT W-12

Pioche Mines Consolidated, Inc.
Pioche, Nevada

Fidelity Philadelphia Trust Co., April 17, 1944

Philadelphia, Pa.

Dears Sirs:

We are sending you under separate cover by express the following securities:

Thirty Year Bonds			Stock Certificates	
Number	Amount	Name	Certificate No.	No. Shares
151	$ 1,000.00	Helen F. Brinley	1	1,650
651	500.00	Francis F. Brockie	2	825
154-155	2,000.00	Brown Bros. Harriman & Co.	4	3,300
156-165	10,000.00	Chellowe Corporation	5	16,500
166-174,801-810	10,000.00	Estate of Clarence M. Clark	6	16,500
175-179	5,000.00	Frank T. Clark	7	8,250
811-812	200.00	Eleanor F. Clark	8	330
1-2	20,000.00	Joseph S. Clark	9	33,000
180-181	2,000.00	Joseph S. Clark, Jr.	10	3,300
182-183	2,000.00	Eckley B. Coxe, 3rd	11	3,300
184-188	5,000.00	Jacob S. Disston, Jr.	12	8,250
813-819,653,189-233,3-9	116,200.00	Fidelity-Philadelphia Trust	57	306,826
820	100.00	Fidelity-Philadelphia Trust	14	165
234-235	2,000.00	Frederick Fraley	15	3,300
236-237	2,000.00	Donald McKay Frost	16	3,300
10-14	50,000.00	Albert P. Gerhard	17	82,500
238	1,000.00	H. P. Glendinning	18	1,650
654	500.00	Dr. Charles J. Hatfield	19	825
239-243	5,000.00	Robert F. Holden	20	8,250
244,245,655	2,500.00	R. H. Knode	21	4,125
246-250	5,000.00	Edward B. Leisenring	22	8,250
251-253	3,000.00	Frank M. Maguire	23	4,950
254-258	5,000.00	Joseph B. Mayer	24	8,250
259-266	8,000.00	Francis F. Milne, Jr.	25	13,200
15,16,267-271	25,000.00	J. Kearsley Mitchell	27	41,250
17	10,000.00	F. Corlies Morgan	28	16,500
18,19,272-276	25,000.00	Samuel W. Morris	29	41,250
277,278,656	2,500.00	F. Eugene Newbold	30	4,125
279,657,821-824	1,900.00	Virginia C. Newbold	31	3,135
658,825	600.00	Virginia Newbold	32	990
280,284	5,000.00	Isaac W. Roberts	33	8,250
285-289	5,000.00	T. Williams Roberts	34	8,250
20	10,000.00	Nicholas G. Roosevelt	35	16,500
290,291	2,000.00	Hugh D. Scott	36	3,300
826-828	300.00	Mrs. Conway Clark Sinkler	37	495
292-296	5,000.00	Paul C. Wagner	38	8,250
659	500.00	Miriam C. Wallis	40	825
297-299	3,000.00	Henry M. Watts	41	4,950

Thirty Year Bonds			Stock Certificates	
Number	Amount	Name	Certif-icate No.	No. Shares
300	1,000.00	Ezra B. Whitman	42	1,650
301-305	5,000.00	David E. Williams, Jr.	50	8,250
21-31,306-310	115,000.00	Willoughby Company	52	189,750
32-33	40,000.00	Sarah A. F. Zimmermann	53	66,000
40,311-315	15,000.00	H. Gates Lloyd & Richard W. Lloyd, Trustees	55	24,750
316-323,660-662,829-833	10,000.00	Anderson & Co.	56	16,500
Total	**$539,800.00**			1,005,766

On Your list of securities we find Henry G. Brooks for $2,500 bonds and 4,125 shares of common stock. These must be deposited with the Nevada Court wherein Mr. Brooks on order of the court has been allowed to intervene as a party denying the right of the debenture holders' committee to represent his bonds, and constitutes an issue in the case now pending in the U. S. Court for the District of Nevada, and will remain an issue to be disposed of by order of the court unless sooner disposed of by dismissal of the action as provided for in the settlement agreement.

Included in the list of $40,000 of bonds claimed by E. W. Clark and Co., as collateral to their note are Theodore E. Brown, for $2,250 and L. R. Lee for $10,500.

Messrs. Brown and Lee have likewise been interpleaded as parties in the Nevada action denying the right of E. W. Clark and Co., to possession of their bonds as collateral. These bonds must likewise be subject to the order of the court unless sooner dis-

posed of by the dismissal of the action as provided in the settlement agreement.

The $40,000 of bonds to E. W. Clark and Co. as collateral must therefore be held subject to receipt of evidence from E. W. Clark and Co. that they have authority to use $40,000 of bonds as collateral, which is a disputed issue in the court as above stated. The auditors have been requested to submit certified copy of the authorization for E. W. Clark and Co., to hold these bonds as collateral.

Also we are sending 30 year Income Notes in total face amount of $35,000 in name of Fidelity Philadelphia Trust Company, in denominations of $5,000 each, making seven 30 year Income Notes No. 1 to 7, inclusive. This is in compliance with 1-C of the settlement agreement which provides that $35,000 of Income Notes shall be delivered to Fidelity Philadelphia Trust Company for attorneys fees for attorneys for Fidelity Philadelphia Trust Company and Debenture Holders' Committee.

Income Bonds, Income Notes and Stock Certificates are being sent you in accordance with the provisions of the settlement agreement and merger agreement, printed copy of which is hereto attached, and in accordance with the list received from you at the direction of the debenture holders' committee and enclosed in your letter of November 22, 1943, with the exceptions above stated.

We call your attention to the provisions of the settlement agreement, Clause C-2 relating to "reasonable reorganization expense" which provides for the payment of the reasonable fee and disbursements for the debenture trustee.

We are advised that the reasonable fee of the debenture trustee with respect to reorganization expenses as well as the disbursements for the debenture trustee with respect thereto are to be discharged by this company as provided in said settlement agreement. We therefore ask for an itemized statement from you of your disbursements made in respect to reorganization expenses and of your fee as depositary, and for the distribution of these securities.

By Order of the Board of Directors.

[Seal] Pioche Mines Consolidated, Inc.
/s/ John Janney, President.

Attest: /s/ E. G. Woods, Secretary

[Printer's Note: Exhibit W-13 is a duplicate of DM-25 which is set out at page 350.]

[Endorsed]: Filed Oct. 23, 1947.

[Title of District Court and Cause]

MOTION FOR ORDER DIRECTING DEPOSIT IN COURT

Defendant, Pioche Mines Company, hereby moves the above entitled Court, pursuant to Rule 64 of the Rules of Civil Procedure for the District Courts of the United States, and Nevada Compiled Laws §8747 for an order of this Court directing plaintiff, Fidelity-Philadelphia Trust Company to deposit with this Court, or the properly authorized officers of this Court, all of the debentures issued by defendant, Pioche Mines Consolidated, Inc., which are now held by said plaintiff, Fidelity-Philadelphia

Trust Company as set for in the Supplemental Complaint on file herein, together with the authority for holding them, said debentures and authority to be held in the custody of this Court, subject to further order of this Court, to be made after notice to all parties to this action; said deposit to include, as well as debentures, every evidence of right arising therefrom or connected therewith, for the reasons as set forth in the affidavits of John Janney and E. G. Woods attached to a similar Motion heretofore filed by defendant, Pioche Mines Consolidated, Inc., and marked respectively, "Exhibit A" and "Exhibit B" thereto.

/s/ DOUGLAS A. BUSEY
Attorney for Defendant,
Pioche Mines Company

Notice of Motion

To: Messrs. Thatcher, Woodburn & Forman,
Messrs. Clark, Hebard & Spahr

Please take notice, that the undersigned will bring the above Motion on for hearing before this Court at its courtroom in Reno, Nevada on the 10th day of November, 1947, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

/s/ DOUGLAS A. BUSEY
Attorney for Defendant,
Pioche Mines Company

Acknowledgment of Service attached.

[Endorsed]: Filed Oct. 23, 1947.

[Title of District Court and Cause]

AFFIDAVIT CONTRA MOTION FOR DEPOSIT IN COURT

Commonwealth of Pennsylvania,
County of Philadelphia—ss:

Miles S. Altemose, being first duly sworn, deposes and says:

That he is a Vice-President of Fidelity-Philadelphia Trust Company (hereinafter referred to as "Fidelity"), one of the plaintiffs in the above entitled action; that as such Vice President he is in charge of Fidelity's Corporate Trust Department and authorized to execute this affidavit for and on behalf of Fidelity; that he has been in charge of said Department either as a Vice-President or an Assistant Secretary of Fidelity continuously since 1920; that the principal value of corporate trusts now being administered by his said Department approximates $600,000,000; that he is personally familiar with the matters and things averred in the pleadings filed in the above entitled action, insofar as such matters and things relate to Fidelity's participation therein and interest as Trustee under the two Pioche Trust Agreements, dated January 2, 1929 and October 1, 1930, respectively, and as Depositary under the Pioche Debenture Holders Agreement dated February 1, 1939; that he has read the affidavits of John Janney and E. G. Woods in support of defendants' "Motion for Order Directing Deposit in Court," filed October 21, 1947 in the above entitled action; and that deponent executes this affidavit as a counter-affidavit to correct certain

misstatements of fact and erroneous conclusions contained in the affidavits of the said Janney and Woods, insofar as said affidavits aver failure on the part of Fidelity to comply in any respect with obligations imposed on it as Trustee and Depositary as aforesaid.

Wherefore, deponent further avers that:

1. Fidelity has at no time caused or contributed to any uncertainty, nor has it caused or contributed to any confusion in connection with the status of Debentures originally certified by it as Trustee as having been issued under the aforesaid Trust Agreements of 1929 and 1930, or with respect to the status of Debentures deposited with it as Depositary under the Pioche Debenture Holders Agreement dated as of February 1, 1939, or otherwise deposited with it, pursuant to the proposed Plan of Reorganization for Pioche specified in the "Settlement Agreement" dated as of July 8, 1942.

2. It is not the usual practice for a corporate trustee to require an independent audit as a basis for its certification of the number and principal amount of securities issued by an obligor under an indenture or trust agreement under which it acts as trustee, inasmuch as such certification can be made from its own books of original entry maintained for the purpose and which, so far as the trustee is concerned, reflect a demonstrable fact, viz., the number and principal amount of securities received by the trustee from the obligor for certification.

3. Defendants admit, in paragraph 4 of their Answer to the Supplemental Complaint filed in the above entitled action, that Six Hundred Eighty-

seven Thousand Three Hundred Dollars ($687,300) of Debentures were certified by Fidelity as having been issued under the above mentioned Trust Agreements, so that there would appear to be no dispute as to this point.

4. Defendants, in paragraph 3 of their Answer to the Supplemental Complaint filed in this action, admit that there has been deposited with Fidelity Five Hundred Ninety-seven Thousand Six Hundred Dollars ($597,600) principal amount of said Debentures (together with scrip and coupons), which Debentures were deposited with Fidelity under the Debenture Holders Agreement of February 1, 1939, so that there would appear to be no dispute as to the amount of Debentures so deposited; and that defendants further admit in said paragraph 3 that there has not been deposited with Fidelity Eighty-nine Thousand Seven Hundred Dollars ($89,700) principal amount of Debentures, which fully accounts for the difference between the number of Debentures certified by Fidelity as having been issued under the Trust Agreements and the number of Debentures deposited with it pursuant to the aforesaid Depositary Agreement, and that if there is any confusion as to the status of the Eighty-nine Thousand Seven Hundred Dollars ($89,700) principal amount of Debentures not deposited, such confusion cannot be charged to Fidelity, inasmuch as all information in regard to the status of said undeposited Debentures (all Debentures having been issued in bearer form) is wholly within the knowledge of the defendants, wherefore deponent is unable to comprehend what useful purpose the audit or audits re-

ferred to in said affidavits of Janney and Woods could have served, assuming that there was any obligation on the part of Fidelity to request such audits, which obligation Fidelity denies, insofar as its duties as Corporate Trustee and Depositary are concerned.

5. Fidelity at no time has obstructed, delayed or thwarted the action of the Stockholders Meeting and Directors Meetings, as is averred by the said John Janney in his aforesaid affidavit, but on the contrary Fidelity has at all times evidenced its willingness to do all in its power to perform all obligations which it is obligated to perform, and in support of this averment deponent refers to the copies of letters written by Fidelity and included among the copies of correspondence attached to the affidavits of the said Janney and Woods, which letters fully disclose Fidelity's position in the matter and its constant endeavor to cooperate and to perform its proper obligations.

6. In further support of Fidelity's position, there are attached hereto and marked Exhibits "F-1" to "F-3", inclusive, copies of correspondence between Fidelity and Pioche, copies of which are not included among the copies of letters attached to the aforesaid affidavits of Janney and Woods.

7. Reference to the copies of letters attached to the aforesaid affidavits of Janney and Woods, and to the copies of letters attached hereto, will disclose that the matters and things apparently in dispute involve questions of law, the construction to be placed on written instruments, and the mechanics of handling a settlement such as that contemplated by

the Settlement Agreement of July 8, 1942, wherefore Fidelity has acted in this matter in accordance with instructions received from competent legal counsel, which counsel until April of 1944, insofar as Fidelity is concerned in the matter, was Percy H. Clark, Esquire, a senior member of the Philadelphia law firm of Clark, Hebard and Spahr, and which counsel in this matter since April of 1944 has been its general counsel, the Philadelphia law firm of Morgan, Lewis & Bockius.

8. Insofar as the aforesaid affidavits allege and repeat and incorporate therein by reference the averments in various pleadings filed by the defendants in the above entitled action and in the proposed Counterclaim which defendants have asked leave to file, charging Fidelity with conspiracy, collusion, misconduct and lack of good faith in the performance of its duties as Corporate Trustee and Depositary, Fidelity again denies each and every one of said averments, and incorporates herein by reference all such denials contained in the aforesaid pleadings filed in the above entitled action by it as one of the plaintiffs.

/s/ MILES S. ALTEMOSE

Sworn to and subscribed before me this 3rd day of November, 1947.

[Seal] /s/ W. HOTZ, Notary Public

[Printer's Note: Exhibits F-1, F-2 and F-3 are identical to Exhibits 59, 62, and 65 reproduced in full at pages 528, 533 and 541 of this printed Record.]

[Endorsed]: Filed Nov. 8, 1947.

[Title of District Court and Cause]

AFFIDAVIT OF THOMAS B. K. RINGE CONTRA MOTION FOR ORDER DIRECTING DEPOSIT IN COURT

Commonwealth of Pennsylvania,
County of Philadelphia—ss:

Thomas B. K. Ringe, being first duly sworn, deposes and says:

That he is a resident of the City and County of Philadelphia, Pennsylvania; that he is a member of the law firm of Morgan, Lewis & Bockius, with offices at 2107 Fidelity-Philadelphia Trust Building, Philadelphia, Pennsylvania; that the said firm of Morgan, Lewis & Bockius acts and has acted over a period of many years as general counsel for Fidelity-Philadelphia Trust Company (hereinafter referred to as "Fidelity"), one of the plaintiffs in the above entitled action; that when his said firm was first consulted by Fidelity, in the year 1944, in regard to the matters and things referred to in the above entitled action, either deponent personally or one of his partners or associates, to wit, H. O. Sebring, Jr. and Randal Morgan, 3rd, advised Fidelity in regard to its position as Corporate Trustee and Depositary; that he is the Thomas B. K. Ringe, Thomas B. Ringe and "Mr. Ringe" referred to in the correspondence attached to the affidavits of John Janney and E. G. Woods in support of the "Motion for Order Directing Deposit in Court" which has been filed in the above entitled action; that at all times deponent, his said partner and associate, and

the firm of Morgan, Lewis & Bockius have endeavored to use their best efforts as counsel for Fidelity to promote the consummation of the Reorganization Plan and the Settlement Agreement of July 8, 1942, as clearly appears from the letters written from time to time by Fidelity to Pioche Mines Consolidated, Inc. and by deponent to Pioche counsel in New York, i.e., Richard E. Dwight, Esquire, of the firm of Dwight, Harris, Koegel & Caskey, copies of which letters are attached to the affidavits of John Janney and E. G. Woods in support of the aforesaid Motion; that, in spite of such efforts, very little progress could be made for reasons disclosed in said letters, particular reference in this connection being made by deponent to Exhibit "DM 31" attached to the affidavit of the said Janney.

That, in order to complete the pertinent correspondence between the parties and their respective counsel, as attached to the aforesaid affidavits, there is attached hereto, made a part hereof and marked "R-1" a true and correct copy of a letter dated April 2, 1945, written by deponent to Richard E. Dwight, Esquire, counsel for Pioche Mines Consolidated, Inc., which letter was not included by the affiant, John Janney, among the exhibits attached to his aforesaid affidavit.

/s/ THOMAS B. K. RINGE

Sworn to and subscribed before me this 4th day of November, 1947.

[Seal] /s/ ETHEL F. ALLEN,
Notary Public

My Commission expires Jan. 7, 1951.

EXHIBIT R-1

Morgan, Lewis & Bockius
2107 Fidelity-Philadelphia Trust Building
Philadelphia 9, Pa.

April 2, 1945

Re: Pioche Mines, Consolidated

Richard E. Dwight, Esq.
Dwight, Harris, Koegel & Caskey, Esqs.
100 Broadway,
New York, N. Y.

Dear Mr. Dwight:

This is in further reply to your letter of March 16, 1945, the receipt of which I have already acknowledged. I have now had an opportunity to give full consideration to the requests which you make on behalf of Pioche Mines Consolidated and to discuss them with Fidelity-Philadelphia Trust Company. I will treat them separately.

First, the request that the Trust Company advise Pioche Mines Consolidated of its acceptance of the new debentures of the reorganized company and accompanying stock in payment of and to be exchanged for the debentures of the old company,—with the understanding that neither the old debentures (nor the trust indentures under which they were issued) will now be cancelled.

In my letter of February 27th I stated that the Trust Company was prepared to make the exchange as soon as the essential steps preliminary thereto

had been taken and pointed out that the Trust Company has not yet received certificates for the following:

1. $89,700 face amount of old debentures.
2. $62,250 face amount of new income bonds.
3. 107,521 shares of common stock of the new company.

It has been our opinion that the certificates for all of these debentures, income bonds and common stock which have not yet been received should be in the hands of the Trust Company before the exchange is made. However, it is quite clear that for reasons not entirely clear to me your clients have reached the conclusion that unless these securities are now accepted, irrespective of the fact that these essential preliminaries have not yet been cared for, the Trust Company will have failed to exhibit the good faith which the circumstances require.

In order to break the deadlock, which certainly should not continue, the Trust Company (with our approval) has decided to accept the new securities forwarded for the exchange and has done so as of today upon the express understanding that the steps which have been described as essential to the consummation of the settlement will be taken with reasonable promptness by your clients, and in accordance with what I understand to be your assurances. I must now look to you as counsel for Pioche to see this through.

Certainly there should be no objection to someone representing both Pioche Mines Consolidated and

the interested individuals discussing with the Trust Company, or with me as counsel for the Trust Company, the clearing away of the problems described in my letter of February 27th. There are of course the reorganization expenses which must be cared for. These things must be done in some way and I do hope that it will be possible for you or someone in your office to cooperate with us in seeing that these matters are cleared.

In this connection, Fidelity has requested me to take up the several matters discussed in Mr. Janney's letter of April 17, 1944. I am now doing so and will write you with respect thereto within the next few days.

Second, the request that the Trust Company should immediately instruct its attorneys in Nevada to consent to and arrange for the discontinuance, without costs, of the existing litigation.

While we should have much preferred to have had in the possession of the Trust Company the balance of the old debentures, new income bonds and stock, and have had completed certain other steps in the settlement, before taking either of the steps requested, we have reached the conclusion, for the reasons hereinbefore stated, that this second request should be granted also and the Trust Company is now prepared to join with other interested counsel in the discontinuance of both the original suit and the counter-claim. Accordingly, appropriate instructions are being forwarded to counsel in Nevada for discontinuance of the litigation, including both the original suit and all counter-claims in such manner

as will dissolve all attachments and satisfy all liability under any bonds of indemnity. It is understood, of course, that the discontinuance of this litigation "without costs" means "without court costs" and will not affect the obligation for the payment of reasonable reorganization expenses, including the bill rendered for services of the Trust Company as Trustee, which payment remains to be made.

Please be assured that the taking of these steps without the prior completion of other essential steps has been because of the desire of the Trust Company to do all within its power towards the completion of the settlement with as much expedition as possible and to establish a basis of further dealing which will permit the remaining problems to be cleared upon a foundation of mutual good faith.

We reiterate that in our opinion Fidelity has not been in default in any particular.

Would it not now be possible for you to advise me with respect to the matters remaining to be disposed of?

Most sincerely yours,

/s/ MORGAN, LEWIS & BOCKIUS

TBKR/R

[Endorsed]: Filed Nov. 8, 1947.

[Title of District Court and Cause]

MOTION TO INTERVENE

Richard K. Baker, hereby moves the Court for

leave to intervene as a party defendant in this action, and to file his Complaint in Intervention, attached hereto, setting forth the claims and defenses for which intervention is sought, and as grounds for intervention states: that applicant is an indispensible party to this action who will be bound by a judgment in the action; that the issues and controversies presented by plaintiffs' Supplemental Complaint herein, and defendants' answer thereto, are based principally upon the construction, interpretation and effect of the Settlement Agreement (attached to plaintiffs' Supplemental Complaint as "Exhibit A"): that Applicant is a party to said Settlement Agreement whose rights will be directly affected and adjudicated by a judgment in this action; that applicant's claims and defenses and the main action have questions of law and fact in common.

In making said motion, applicant will use and rely upon all the records, files and proceedings in this action, and the Affidavit of Richard K. Baker entitled "Affidavit in Support of Motion to Intervene and for Support of Motion to Deposit in Court," served herewith.

Dated: January 22, 1948.

/s/ SPRINGMYER V. THOMPSON
/s/ BRUCE R. THOMPSON
Attorneys for Applicant for Intervention.

No. 12865

United States
Court of Appeals
for the Ninth Circuit

PIOCHE MINES CONSOLIDATED, INC., PIOCHE MINES COMPANY, JOHN JANNEY and RICHARD K. BAKER,

Appellants,

vs.

FIDELITY-PHILADELPHIA TRUST COMPANY, Trustee, and E. CLARENCE MILLER and EDWARD C. DALE,

Appellees.

Transcript of Record

In Three Volumes

Volume II

(Pages 441 to 888)

Appeal from the United States District Court
for the District of Nevada

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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NOTICE OF MOTION

To: Thatcher, Woodburn & Forman, Clark, Hebard & Spahr, Attorneys for Plaintiffs; Douglas A. Busey, Attorney for Pioche Mines Co.; Francis T. Cornish, Attorney for Pioche Consolidated Mines Co.

Please take notice that the undersigned will bring the above motion on for hearing before this Court at Carson City, Nevada in the Courtroom in the United States Post Office Building on February 2, 1948 at 10:00 o'clock A.M., or as soon thereafter as counsel may be heard.

/s/ SPRINGMYER V. THOMPSON
/s/ BRUCE R. THOMPSON
Attorneys for Applicant for Intervention.

Acknowledgment of Service attached.

[Endorsed]: Filed Jan. 23, 1948.

[Title of District Court and Cause]

AFFIDAVIT IN SUPPORT OF MOTION TO INTERVENE AND FOR SUPPORT OF MOTION TO DEPOSIT IN COURT

State of Nevada,
County of Lincoln—ss.

Richard K. Baker, being first duly sworn, deposes and says:

That he is the Richard K. Baker named in the

Settlement Agreement; that he executed the Settlement Agreement on July 16, 1942, after the debenture holders, acting by and through their committee, Clark, Holden and Gerhard, had become irrevocably bound thereto on July 8, 1942;

That at a meeting with the Debenture Holders' Committee Affiant asserted a claim for damages caused by various and sundry acts and interventions of Percy H. Clark who at the time was a Vice-President and also attorney for said Pioche Mines Consolidated, Inc., but who, in spite of his obligations arising from the Trust relationship acted in furtherance of a conspiracy to prevent the performance by this Affiant of a certain contract, and that he did hinder and prevent the completion of said contract, which contract provided for the financing of the company through the sale of 200,000 shares of Treasury Stock at $5.00 per share;

That Affiant's claim for damages was admitted by Clark and the Debenture Holders' Committee and allowed as a part of the proposed settlement in paragraph A. (2) (a) thereof, in the following language:—

"There is specifically included as a debt justly owed by the company, the following:—

(a) Claim of Richard K. Baker for breach of written contract giving him the exclusive right to sell stock of the company, settled for $25,000 principal of income bonds."

That Affiant in his individual or personal capacity also agreed to accept income bonds of the new issue in payment of the cash he had advanced to the Pioche Mines Consolidated Company;

That at the meeting with the Debenture Holders' Committee wherein he agreed to accept new securities in settlement of the foregoing claims, it was agreed on the part of the debenture holders that the properties were to be put into operation at the earliest possible moment, and that the Debenture Holders' Committee would use their best efforts to get consent from the rest of the debenture holders consisting of some fourteen others, and it was represented that the Debenture Holders' Committee had the authority to bind to the agreement they had signed all the debenture holders under whose authority they had been acting;

That at the same meeting Affiant was asked to negotiate with the Debenture Holders' Committee in respect to the claims of the Boston Stockholders and Creditors. That Affiant refused and informed the Debenture Holders' Committee that under no circumstances would the Boston Committee again engage in negotiations with the Philadelphia Committee or have any dealings with them in respect to any settlement, because on two previous occasions they were persuaded to enter into negotiations of settlement with the Debenture Holders' Committee and their costly efforts came to naught when each time definite agreements arrived at were repudiated by the Debenture Holders' Committee in attempting to gain additional concessions. Affiant stated, however, that he would present to the Boston Committee for their acceptance or rejection a contract of settlement after the Debenture Holders' Committee had firmly bound the Philadelphia Debenture Holders to the said contract;

That subsequently Affiant was present at a meeting of the Boston Committee of Stockholders and Creditors held on July 10th, 1942, whereat the Settlement Agreement which had been already signed by the Debenture Holders' Committee was presented to the Boston Committee for their consideration; and that Affiant was authorized by the meeting to consent, on behalf of the Boston Committee of Stockholders and Creditors, to the Settlement and on July 23rd their consent was endorsed by Affiant on the Contract;

That a delay in authorizing the signatures to this first endorsement of the contract was occasioned by Debenture Holders' Committee in neglecting and refusing to give information requested by the Boston Committee in letters and telegrams which asked for an estimate of the expenses of Debenture Holders' Committee, provided for in the Settlement Contract;

That this obstruction number one, by the Debenture Holders' Committee was by-passed when an understanding with the Pioche Company was reached that the expenses would be limited to reasonable expenses as the Settlement Agreement provides, and to insure that the contract in this regard would be fairly carried out, the Boston Committee would be allowed to have their representative at the meeting of the Board of Directors to protect their interests against this provision of the contract being disregarded. This was after the Debenture Holders' Committee had wired Augustus Hemenway, Secretary of the Boston Committee, "Our

Committee feels you should look to them (Janney and Baker) for any further information you require";

That after Affiant had affixed his signature in his personal capacity on July 16th, and in his capacity as representing the Boston Committee on July 23rd, the Debenture Holders' Committee was called upon to secure the signatures of the undeposited debenture holders provided for in Clause VII of said Agreement. That under Clause VII of said Agreement, Debenture Holders' Committee warranted that they had authority to bind the Debenture Holders who had deposited their debentures which were later found to be $530,100 in amount, and the non-deposited debenture holders whose consents to the Settlement Agreement they agreed to use their best efforts to obtain, comprised fourteen debenture holders who held $67,500 of debentures; that these fourteen persons resided in or near Philadelphia and could have been interviewed for acceptance or rejection of the Agreement within 10 days;

That Affiant signed the Settlement Agreement for himself and for the Boston Committee with the intent as set out in said Agreement that the Company's properties would be turned into an enterprise profitable to the creditors and stockholders at the earliest possible moment, but that nevertheless the Debenture Holders' Committee on one excuse after another delayed securing the consents of the undeposited debenture holders and made no effort to secure same until May, 1943, and moreover they delayed until December 26, 1942 agreeing to the form

of the contract of merger which was to be submitted to the Stockholders' Meetings of the various companies for approval, and that nothing this Affiant could do was successful in hurrying the Debenture Holders' Committee in discharging these obligations;

That on advice of Percy H. Clark, Chairman of the Debenture Holders' Committee, to the Company's general counsel in New York, that he had obtained the consents of most of the undeposited debentures, the Stockholders' Meeting was called for July 15, 1943, on assurances of Mr. Clark that such consents would be on hand for the meeting, and that affiant together with A. L. Putnam, Chairman of the Boston Committee, journey from Boston to Pioche to attend said Stockholders' Meeting and arrived in time for an adjourned meeting on July 19th;

That Affiant represented the Boston Committee of Stockholders and Creditors at the Stockholders' Meetings called for the purpose of ratifying the Settlement and Merger Agreements, and was present at meetings including adjourned meetings of said stockholders, with proxies to vote their stock in consummation of the Settlement, and with authority to turn in their old debentures and notes that represented cash loaned to the company, taking in exchange therefor the new securities provided for in Settlement Agreement, which exchange was made as soon as the new securities could be issued;

That for said meeting Affiant held the power of attorney to exchange $102,500 of Notes and deben-

tures of Pioche Mines Consolidated, and $30,000 of notes of Pioche Mines Company into new securities provided for under the Settlement Agreement, and in his own name held $110,000 of notes of Pioche Mines Consolidated to likewise exchange into new securities, and was in a position to subscribe $50,000 of the new Preference Notes, with the view of immediately consummating the Settlement Agreement and proceeding with the plans to operate the combined merged properties as in the Settlement Agreement provided;

That Affiant was one of those appointed to serve on a committee of stockholders to examine the consents of the undeposited debenture holders provided in Clause VII of the Settlement Agreement;

That after calling the meeting to order, the Chairman read to the meeting a telegram which he had wired to Mr. Dwight, under date of July 13th, which read as follows:

"We had expected within reasonable time before our meeting to have positive assurances that at least 80% of non-assenting debenture holders would be classified as to those who definitely consent to settlement and merger agreements and those who refuse to consent. Furthermore we expected in advance of meeting to have a list furnished us for the purposes of meeting of those who have definitely consented and those who have definitely refused. Stop. So far we have no such information, whereas meeting was called and noticed believing this would be done and by implication the notice so states. Shall we permit those who will make expensive journey to attend

meeting to do so in view of this failure of information or shall we call off the meeting and proceed with the litigation."

That Mr. Dwight's reply, dated July 13th, to this telegram was next read to the meeting, as follows:

"Received letter dated July ninth over signature of Percy H. Clark advising us in detail of debenture holders who have consented to the proposed merger. Stop. Excluding Kansas City Structural Steel Company ten thousand and District National Bank sixty thousand all the debenture holders have assented with exception six whose total aggregate of bonds is only twenty six hundred. Stop. Copy of this letter has been airmailed to Woods at Pioche. Stop. Believe you can rely upon this statement and that you should therefore go ahead with stockholders' meeting at Pioche on fifteenth. Stop. Are preparing forms of debentures and notes to be issued by merged company but it is unnecessary that the form of these should be approved at the stockholders' meeting."

That in attendance on Stockholders' Meeting on July 19th, among others was Mr. George B. Thatcher, attorney of Reno, who held proxies to represent the Clark interests and other Philadelphia interests, and he was asked about the consents which had been promised, would they be presented to the meeting in compliance with Clause VII of Settlement Agreement; to which Mr. Thatcher replied that he was willing to accept the statement of Mr. Clark that he had secured the consents of the non-deposited debenture holders. Whereupon Mr. Thatcher was

asked, would he guarantee that the debentures would be deposited, to which Mr. Thatcher replied that he would not;

That following this the meeting requested Mr. Thatcher to telegraph Mr. Clark for the necessary information so that the vote could be had upon the merger with knowledge of what debentures would be outstanding as a cash obligation of merged company; the meeting also addressed telegrams and letters to Mr. Dwight, to the Debenture Holders' Committee, to Fidelity Philadelphia Trust Company, and to Hartshorn and Walter, Auditors, but in spite of the prodigious efforts of the meeting to clear up evasions and evident attempts to confuse the meeting, it was not until December 3, 1943, nearly six months after the Stockholders' Meeting had assembled that the doubts in this matter were satisfactorily resolved by answers in sufficiently definite form to admit of any intelligent vote upon the question of merging these properties;

That a definite answer to the oft-repeated question, How many debentures were committed to the Settlement, and how many were not committed to exchange old securities for new upon the consummation of the Merger was not received until December 3rd;

That 10 days after the Stockholders' Meeting assembled the committee on assents received information that the assents obtained from the non-depositing debenture holders were not assents to the terms of the Settlement Agreement as required in Clause VII but were consents to another different form of

agreement which in effect gave the Debenture Holders' Committee the power to disrupt the Settlement, in that new terms and conditions, not a part of the Settlement Agreement, could be required in addition to what was set forth in said Settlement Contract; and all of the parties to the Settlement would in this way be compelled to accept the changes in the Agreement dictated by the Debenture Holders' committee under penalty of paying cash to the extent of $67,500, on the debentures held by non-depositing debenture holder group which is the group covered in Clause VII of the Settlement Agreement;

That at one time, namely in the month of August, what appeared to be a definite reply to the objection to the form of the consents was received from the Debenture Holders' Committee, in which Mr. Clark, the Chairman, denied that the consents contained conditions, but on following the question up with the auditors it was developed that this favorable assurance could not be confirmed, and then for several months Fidelity Trust Company carried on with the confusion;

Affiant attaches hereto a copy of the Minutes of the initial proceedings of the Stockholders' Meeting referred to above, marked Exhibit Baker No. 1.

Also filed herewith are the Exhibits made a part of this Affidavit and marked Exhibits Baker No. 2 to 85, inclusive, which Exhibits are filed for the purpose of showing the efforts which were made by Affiant and his associated member of the Boston Committee, Mr. A. L. Putnam, and also the efforts

made by the other stockholders and creditors present at the Stockholders' Meeting, to clear up the doubts which were raised by the vaccilations, evasions and uncertainties of the Fidelity Philadelphia Trust Company and the Debenture Holders' Committee, on the question of which debentures would remain outstanding after the merger was voted. Time and again the simple question was asked, what debentures have assented and which have refused to assent to the Settlement Agreement, and time and again the direct answer was avoided;

Affiant avers that this precautionary step was necessary as otherwise the subtle efforts of the conspirators would have misled the Stockholders' Meeting in voting on the merger; That the statements made by Fidelity Philadelphia Trust Company and the Debenture Holders' Committee appear to have been well calculated to mislead Pioche Mines Company into voting away its properties which were entirely clear of any claim of the debentures, and also calculated to mislead the creditors who held Pioche Mines Company notes which were a prior claim to the properties of said Pioche Mines Company, which said creditors were asked to assume, to their disadvantage, a position on an equality with the debenture holders by accepting 30 year income notes without getting the consideration therefor which was the promised benefit of quickly putting the combined properties into operation, the clearly expressed intent of the Settlement Agreement;

That the Stockholders' Meetings of the three

merged companies also needed to make sure that no substantial amount of debentures would be outstanding as a claim on the limited cash resources of the merged company because the ability of the company to finance had been destroyed by the conspiracy, which conspiracy is set forth in Defendants' Answer.

That a further compelling reason back of the desire to prevent a substantial amount of debenture holders from being held out and not bound by the Settlement Agreement, followed from what happened in the Conversion Plan of 1937-38; That Affiant participated in that plan because of which financing plans of the company were stopped to give consideration to an offer of the debenture holders to convert their debentures into stock, based upon $250,000 of new money going into the company; That a majority of the debenture holders promptly signed the contract and after said $250,000 was offered, a small number of debenture holders who held out were used as a club over the company's head to coerce last-minute concessions which took the form in this case of a demand by Percy H. Clark for a release to his law firm covering all past transactions with the company, which release on advice of counsel could not be given, after which the plan stood incompleted although 75% of the debenture holders had signed;

That in the present case the preferred creditors relinquished their cash demand loans backed by good security in exchange for 30-year income notes in a company, the progress of which has been

obstructed by the very parties who induced them to vote the merger and make the exchange, representing that Fidelity and the Debenture Holders' Committee would cooperate in every way in putting the company into early operation during the period of high metal prices;

That at the time Affiant surrendered notes and debentures to the total amount of $242,500 in exchange for the new securities, he was acting with the belief that the assurances given the Stockholders' Meetings left no doubt but that practically all of the creditors including the debenture holders would immediately surrender their securities, so that the property might promptly be operated, and that Affiant considers and believes and therefore avers that he has been deceived and misled by the representations made to the Stockholders' Meetings as set forth in letters and telegrams attached hereto as Exhibits. And Affiant further avers that this belief has been strengthened and corroborated by what followed as disclosed in correspondence with Fidelity Philadelphia Trust Company in reference to their failure to deliver the new Securities issued under the Settlement Agreement and their efforts to use the machinery of the Securities and Exchange Commission to prevent consummation of the Settlement, and efforts to use their holding up the new bonds without authority as a basis for demands not within the Contract and by way of support to Debenture Holders' Committee in their effort to force changes in the Contract.

That Affiant and Mr. A. L. Putnam, Chairman of the Boston Committee of Stockholders and Creditors, were kept away from their business in Boston much of the time between July and December, 1943, to their great inconvenience and loss, due to the evasions and tricky answers and positive deceptions which will appear from a study of the Exhibits hereto attached; and that Affiant and said Putnam made special effort to have Fidelity and the Debenture Holders' Committee take a definite position on their obligations, asking them to give the amount in dollars of those whose consent had been obtained and of those who had refused to consent to the terms of the Settlement Agreement, this being one of the items the Auditor would have to show in his Balance Sheet, to be listed among the cash obligations of the merged company, and a necessary part of the representations that must be made to any purchaser of the Preference Notes;

That the evasions, trickery and deceptions of Fidelity Philadelphia Trust Company and the Debenture Holders' Committee, and the patient, persistent and painstaking efforts to overcome same will abundantly appear from a study of the correspondence between them and Pioche Mines Consolidated covering the period of 1943-45, inclusive.

That this Affiant believes that the deposit in Court of the old debentures as prayed for in the motion of the Defendant Pioche Mines Consolidated will enable the Court to have ended the interference by Fidelity Philadelphia Trust Company which now holds these debentures on its own motion without any authority or right to hold same, and the in-

terference of the debenture holders who are committed to accept same in exchange for their old debentures, and have ended the interference of said parties in holding up a full and complete accounting of their stewardship as custodian of these Securities, by the issuance of such orders as the Court may deem equitable and right upon inspection of the original documents and debentures which are now being withheld from the parties rightfully entitled to them, with the resulting tie-up of the operation of these properties and the necessary business in connection therewith.

That also will be ended the deadlock in Fidelity Philadelphia Trust Company's distribution of the new securities, wherein said Fidelity is continuing to demand conditions not required in the Settlement Agreement, nor provided for therein, as a cover-up of the failure of the Debenture Holders' Committee to be represented at the Directors' Meeting held for the purpose of consummating the details of the Settlement, as well as of other breaches of the Contract of Settlement, and acts of ill-faith on the part of the debenture holders as a means of aiding said debenture holders in their plans to keep inactive the Defendant Pioche Mines Consolidated's merged properties.

/s/ RICHARD K. BAKER.

Subscribed and sworn to before me this 10th day of December, 1947.

[Seal] /s/ E. L. NORES,
Notary Public.

My Commission expires July 29, 1950.

EXHIBIT NO. 1

Minutes of Meeting of Stockholders of Pioche Mines Consolidated

July 19, 1943

Held pursuant to adjournment of previous meeting was called to order at 10:00 A. M., July 19, 1943, in the office of the company at Pioche, Nevada.

There was present in person:—John Janney, E. G. Woods, Morgan G. Heap, S. W. Ford, Augustus L. Putnam, Richard K. Baker, J. Harry Crafton, John P. Thatcher and George B. Thatcher.

Mr. Janney presided as Chairman of the meeting. The Secretary was called upon to read to the meeting the notice that had been sent out to stockholders. The reading of the Notice was interrupted by Mr. Geo. B. Thatcher who moved that we waive the reading of the Notice.

Upon motion the reading of the notice was waived, but the Notice as sent out to stockholders was ordered to be filed with the Minutes of the meeting, along with the certificate of the secretary that the notice had been sent out to all stockholders of record. The certificate of the Secretary was also ordered to be incorporated in the Minutes of the Meeting, and is as follows:—

Certificate of Notice of Meeting
Pioche Mines Consolidated, Inc.

I, the undersigned, Secretary of the Pioche Mines Consolidated, Inc. do hereby certify that in accordance with the by-laws requirements of said Company, a copy of the attached notice, properly en-

closed and directed, and with postage prepaid, was by me on the 15th day of June, 1943, mailed to each stockholder of record of said Company at his address as it appeared on the books of the Company.

Pioche, Nevada, June 15, 1943.

/s/ E. G. WOODS,
Secretary, Pioche Mines Consolidated, Inc.

The Chairman asked for a report from the Secretary on the proxies he had received by mail, and Mr. Woods reported receiving proxies for 1,017,214 shares out of a total authorized issue of 2,500,000 shares, of which 1,877,421 are outstanding.

Whereupon the Chairman appointed John P. Thatcher, Harry Crafton and Morgan G. Heap as a Committee on Proxies to check the validity of the proxies received, and report such as may be found to be in proper form to the meeting.

Mr. Geo. B. Thatcher moved that the report of the Secretary be accepted, and that it be shown that the number of shares were present at this meeting by proxy.

The Chairman ruled that it would be more in order, and that he thought the proxies should be checked by the committee.

Next the Chairman read a telegram which he had sent on July 13th from Salt Lake City to Mr. Richard E. Dwight of New York, attorney for the company as follows:—

"We had expected within reasonable time before our meeting to have positive assurances that at least

80% of non-assenting debenture holders would be classified as to those who definitely consent to settlement and merger agreements and those who refuse to consent. Furthermore we expected in advance of meeting to have a list furnished us for the purposes of meeting of those who have definitely consented and those who have definitely refused. Stop So far we have no such information, whereas meeting was called and noticed believing this would be done and by implication the notice so states. Shall we permit those who will make expensive journey to attend meeting to do so in view of this failure of information or shall we call off the meeting and proceed with the litigation."

Next was read to the meeting the reply to the above telegram from Mr. Dwight, also dated July 13th, as follows:—

"Received letter dated July ninth over signature of Percy H. Clark advising us in detail of debenture holders who have consented to the proposed merger. Stop Excluding Kansas City Structural Steel Company ten thousand and District National Bank sixty thousand all the debenture holders have assented with exception six whose total aggregate of bonds is only twenty six hundred. Stop Copy of this letter has been airmailed to Woods at Pioche. Stop Believe you can rely upon this statement and that you should therefore go ahead with stockholders' meeting at Pioche on fifteenth. Stop Are preparing form of debentures and notes to be issued by merged company but it is unnecessary that the form of these should be approved at the stockholders' meeting."

The Chairman then stated that a letter which had been received from Mr. Percy H. Clark, Chairman of the Debenture Holders' Committee under date of July 9, enclosing copy of a letter he had sent to Mr. Dwight was unintelligible and unsatisfactory in the important matter of reporting which of the debenture holders had given their consents to the Settlement Agreement, and which had refused. That a definite report is in order on this inasmuch as Clause VII of said Agreement places upon the Debenture Holders' Committee an obligation to use their best efforts to secure such consents.

Whereupon the Chairman appointed Mr. George B. Thatcher, Mr. Richard K. Baker and Mr. A. L. Putnam as a committee to check the consents binding debenture holders to the Settlement Agreement and report to the meeting setting forth which debenture holders had consented and which had refused to consent to the Agreement. Mr. Thatcher stated that he did not understand what was desired and he had no authority to represent the debenture holders.

Mr. Baker stated to the meeting that if any of these debenture holders under Clause VII had consented we were entitled to a statement, with their signatures showing that they have consented. "We want to know what they have consented to and what they have signed. We have the signature of the Boston group and we have the signatures of the other group of debenture holders to the Settlement Agreement. The bondholders covered in Clause VII of the Settlement Agreement must be correctly re-

ported by the Debenture Holders' Committee who are responsible for obtaining their consents.

Mr. Janney stated to the meeting that on the 22nd of March a letter had been sent to Mr. Clark notifying him that we would have to have the consent of the undeposited debenture holders or we must proceed with the litigation and that Mr. Clark had assured him and also Mr. Dwight that he would secure the consent of the non-deposited debenture holders.

Mr. Baker made a motion that the meeting be adjourned until the undeposited debenture holders' committee signatures had been secured as provided under Clause VII of the Settlement Agreement. Mr. Crafton seconded the motion. Mr. Thatcher interposed that he was willing to accept the statement of Mr. Clark that he had secured the consents of the non-deposited debenture holders.

Whereupon the Chairman asked Mr. Thatcher if he would be willing as a representative of the Philadelphia interests to guarantee that these consents had been obtained. Mr. Thatcher interrupted "No, you can stop right there, I would not. I have had no advice on it at all, I guarantee nothing."

The Chairman then asked Mr. Thatcher if he thought he could telephone or telegraph Mr. Clark and get the necessary authority to proceed. To this Mr. Thatcher replied "I would suggest that you send a telegram as President of this Company and ask that he telegraph you."

The Chairman stated that the Agreement pro-

vides that the Debenture Holders' Committee would use their best efforts to obtain the consents to the Settlement and that it was necessary to have a report definitely setting forth what the result of their efforts had been. Mr. Thatcher replied that as he understood it in the consents that have been gotten by Mr. Clark up to this date there is a proviso there that they would turn in their bonds to Mr. Clark, but that may mean a great many things.

The Chairman replied, "If there are provisos we ought to know what they mean."

The Chairman then requested Mr. Thatcher to send a telegram which he then prepared and read to the meeting, as follows:—

"Will you authorize me to guarantee on behalf of your committee that you have obtained the consent of debenture holders as listed on page two of your letter of July 9th to Richard E. Dwight, and that these bonds will be deposited with the trustee upon the completion of the merger by the filing of the necessary papers with the secretary of state's office of the State of Nevada."

Mr. Thatcher replied that he would send the telegram in his own words. Mr. Thatcher then prepared the following telegram, which was sent to Mr. Clark:—

"Will you authorize me to represent to the stockholders' meeting that you guarantee on behalf of your committee that you have obtained the consent of the debenture holders' as listed on page two of your letter of July 9th to Richard E. Dwight and

that these bonds will be deposited with the trustee upon the completion of the merger by the filing of the necessary papers with the secretary of state's office of the State of Nevada."

Mr. Baker made a motion that the meeting adjourn until we get an answer to this telegram. Mr. Thatcher made a reply that he did not see why we could not go through with the other matters, and proceed to vote the merger. Mr. Baker answered that he thought we should wait, that we may go back into court if we do not get a satisfactory reply with reference to the consents.

The Chairman then announced that the motion was before the meeting, that we wait for the answer to the telegram, the report of the stockholders' proxy committee and the report of the committee on consents of the debenture holders. "I believe the committees have been appointed", he said. "Messrs. Heap, Crafton, and Thatcher, Jr. on the proxy committee, and Baker, Putnam and Thatcher, Sr., on the consents of the debenture holders. We should get a reply to this telegram by 2:00 o'clock."

Whereupon Mr. Thatcher announced that he refused to serve on the committee on consents for the debenture holders.

The meeting then voted to adjourn until 2:00 o'clock.

Certified true copy.

/s/ E. G. WOODS,
Secretary.

Minutes of Stockholders' Adjourned Meeting

July 19, 1943

Minutes of Meeting of the Stockholders of the Pioche Mines Consolidated, at 2:00 o'clock P.M., adjourned from morning meeting of the same date.

Present:—John Janney, E. G. Woods, Morgan G. Heap, S. W. Ford, Augustus L. Putnam, Richard K. Baker, J. Harry Crafton, John P. Thatcher, George B. Thatcher, Mrs. John Janney and Mrs. Agnes Crowe Kneedler.

Report was made to the meeting that no reply had been received to the telegram sent the Debenture Holders' Committee.

Motion made, seconded and carried to send the following telegram of Mr. Richard E. Dwight, which was read to the meeting:—

"Richard E. Dwight,
100 Broadway, New York, N. Y.

"Mr. Thatcher as representative of Clark interests has refused to guarantee the consents as listed on page two Clark's letter July ninth to you. Please request Percy Clark to telegraph me on behalf of Debenture Holders' Committee which names listed page two his letter definitely consent to Settlement Agreement, and can be depended upon to deposit their bonds on completion of merger by vote of stockholders' meeting and filing merger agreement with secretary of state as required by law."

Pioche Mines Consolidated,
By E. G. Woods, Secretary."

Objected to by Mr. Thatcher, Sr., and Mr. Thatcher, Jr. Mr. Thatcher, Sr. stated that he objected on the ground that he was not here representing the debenture holders.

The Chairman replied that the telegram did not say "Debenture Holders", it said "Clark interests". Whereupon the Secretary was asked to read from the proxy list the names of those Mr. Thatcher represented. The Secretary read the following names: Percy H. Clark, Joseph S. Clark, E. Sewell Clark, Jos. Clark, Jr., Frank T. Clark, George R. Clark, Wm. L. Clark, Drexel and Co., Edward C. Dale, Albert P. Gerhard, and E. Clarence Miller.

The reading of the list was interrupted by a call for the vote. Whereupon motion was put and carried and the telegram to Mr. Dwight was ordered sent in the form as read to the meeting.

Whereupon telegram to Mr. Dwight was sent.

Next the Chairman asked for a report from the Committee on Proxies.

J. Harry Crafton of the Committee on Proxies reported on number of shares covered by proxies received, which were 1,292,371, and in addition to that he held approximately 70,000 shares represented in proxies not yet tabulated, which were given to him in October authorizing him to vote in approval of Merger Agreement and Settlement Agreement.

Mr. Janney:—What is the total amount of stock that can vote, counting those personally present?

Mr. Woods:—1,477,421 shares.

Mr. Janney:—Mr. Crafton, you have how many more?

Mr. Crafton:—Between 50 and 100,000.

Mr. Janney:—A majority would be 938,710, and without counting Mr. Crafton's proxies, we have 360,000 more than are necessary. And we have in addition to that approximately 100,000 additional which are available to me if needed or if called for.

Next the Auditor was asked to report as to the pro forma balance sheet required by the meeting. Mr. Frank G. Shaw, representing the firm of Hartshorn & Walter then reported that his pro forma balance sheet was awaiting information relative to the consents from the Debenture Holders' Committee in such definite form as his certificate required; that he did not know how many are going to accept or not accept.

Whereupon at the request of the meeting the following telegram was sent to the Philadelphia Committee by Mr. Thatcher:—

"Company requires that they have here a certified copy of the consent or consents of debenture-holders list on page two Dwight letter July ninth. Your certification as to the correctness of the copy acceptable. Send direct to the company airmail. This information is required by the Auditor, so that he can have definite information in setting up his pro forma balance sheet."

Mr. Janney then stated, that all we are waiting for is the evidence of the consent of the debenture holders, that under paragraph VII the Philadelphia Committee are responsible to secure them and they should report the result of their efforts in such form as will be acceptable to the Auditors, so that they

can be included in their report. I don't see how we can proceed unless we get a satisfactory answer to these telegrams.

Mr. Baker then made a motion to adjourn until we get answer to telegram.

The meeting adjourned to reconvene at 4:00 o'clock, and await a reply to the telegram above quoted. At 4:30 the following reply was received from Mr. Clark:—

"I guarantee on behalf of my committee that we have obtained the consent of the debenture holders as set forth in my letter of July 9 to Richard E. Dwight and that our committee will request these debentures holders to deposit their bonds with Fidelity under the debenture holders' agreement as soon as advised by you that the merger Agreement in the approved form properly certified has been filed in the office of the secretary of State of Nevada. We are convinced debentures will be deposited promptly subject to usual delay on account of holidays."

After discussion, it was the sense of the meeting that the above telegram was evasive because it referred to letter of July 9, which is vague and indefinite in meaning and it does not give the authority asked for to allow Mr. Thatcher to represent to the meeting what consents had been obtained under Paragraph VII of Settlement Agreement.

It was further the sense of the meeting that the Auditor's report could not be completed until information was received in more definite form specifying which bondholders were obligated to take the

new securities of the merged corporation, and which would not. This information would depend upon the consents obtained by the Debenture Holders' Committee. Since after repeated efforts satisfactory information was not in hand, it is deemed necessary to have before the meeting the documents themselves signed by the debenture holders, which have been reported to have assented to said agreement. Therefore upon motion duly made and seconded, and unanimously adopted, the meeting was adjourned until Friday, July 23rd, at 10:00 A. M., to await the reply of the Debenture Holders' Committee to the telegram from Mr. Thatcher, requesting that they send the original signed contracts or certified copies thereof, embodying the consents of the remaining debenture holders.

Mr. Shaw reported that as soon as he received satisfactory evidence of the consents binding the debenture holders to deposit their bonds in accord with the Settlement Agreement, he would be in position to complete the pro forma balance sheet, but that the binding nature of the consents should be definite, and show the amount of debentures that will remain outstanding after the merger is consummated.

Meeting adjourned to meet Friday, July 23rd, at 10:00 A.M.

Certified true copy.

/s/ E. G. WOODS,
Secretary.

EXHIBIT NO. 2

Dwight, Harris, Koegel & Caskey

100 Broadway, New York

July 7, 1943

Percy H. Clark, Esq.,
Messrs. Clark, Hebard & Spahr,
1500 Walnut St. Building,
Philadelphia, Pa.

Re: Pioche Mines Consolidated

Dear Mr. Clark:

Your letter of July 2nd was duly received.

I am still not in receipt from you of a definite list of those who have consented and those who have withheld their consent to the Merger and Settlement Agreements. Will you please send me a definite list of those who have consented, and please place those who have not definitely consented in a list of non-assenting debenture holders, so that I can forward to my client a list of the consenting and also a list of the non-assenting debenture holders. This information must be available to the auditors immediately in order that the pro forma balance sheet may be ready for the July 15th meeting.

My advice to the Pioche Mines Consolidated to go ahead and call a stockholders' meeting for July 15th was based upon your assurances to me that you would secure the consent of substantially all of the

remaining non-assenting debenture holders, and my clients have acted accordingly.

Very truly yours,

Richard E. Dwight.

RED MC—cc: Mr. Gerhard; cc. Mr. Holden; cc. Mr. Janney.

[Printer's Note: Exhibit 3 is a duplicate of Exhibit W-5 set out at page 398.]

EXHIBIT NO. 4

Law Offices Clark, Hebard & Spahr
1500 Walnut Street Building, Philadelphia

July 9, 1943

Mr. E. G. Woods, Secretary
Pioche Mines Consolidated, Inc.
Pioche, Nevada

My dear Mr. Woods:

I received a request yesterday from Mr. Dwight for information concerning the debenture-holders from whom consents to the reorganization have been secured. You will find enclosed copy of my reply to Mr. Dwight's letter with enclosures which I am sending direct to you because of the short length of time before the meeting. Mr. Dwight's secretary has approved of this.

Very truly yours,

Percy H. Clark.

PHC:mac—Enc.

EXHIBIT NO. 5

Law Offices Clark, Hebard & Spahr
1500 Walnut Street Building, Philadelphia

July 12, 1943

E. G. Woods, Secretary
Pioche Mines Consolidated, Inc.
Pioche, Nevada

My dear Mr. Woods:

You will find enclosed an envelope addressed to Mr. George B. Thatcher or his nominee. Mr. Thatcher will attend the stockholders' meeting himself or send someone from his office who will vote the proxies of our Philadelphia group. Most of the proxies have already been sent to Mr. Thatcher. The enclosed envelope contains a few that have been late in coming in. Will you kindly give this envelope to whoever puts in his appearance at the meeting to vote our proxies. We, of course, expect to have them voted in favor of the reorganization and merger.

Very truly yours,

/s/ Percy H. Clark.

PHC:mac—Enc.

EXHIBIT NO. 6

Pioche, Nevada, July 19, 1943

Percy H. Clark,
Chairman of the Debenture Holders' Committee,
1500 Walnut St. Bldg., Philadelphia, Pa.

Company requires that they have here a certified

copy of the consent or consents of debenture-holders list on page two Dwight letter July ninth. Your certification as to the correctness of the copy acceptable. Send direct to the company airmail. This information is required by the auditor, so that he can have definite information in setting up his pro forma balance sheet.

/s/ George B. Thatcher.

EXHIBIT NO. 7

Pioche, Nevada, July 19th, 1943

Percy H. Clark,
Chairman of the Debenture Holders' Committee
1500 Walnut Street Bldg.,
Philadelphia, Pa.

Will you authorize me to represent to the stockholders' meeting that you guarantee on behalf of your committee that you have obtained the consent of the debenture holders' as listed on page two of your letter of July 9th to Richard E. Dwight and that these bonds will be deposited with the trustee upon the completion of the merger by the filing of the necessary papers with the secretary of state's office of the State of Nevada.

Geo. B. Thatcher.

EXHIBIT NO. 8

[Telegram]

Philadelphia Penn 531 pm July 19 1943

George B. Thatcher, Care Pioche Mines Consolidated, Pioche Nev.

I guarantee on behalf of my committee that we

have obtained the consent of the debenture-holders as set forth in my letter of July 9 to Richard E Dwight and that our committee will request these debenture-holders to deposit their bonds with Fidelity under the debenture-holders agreement as soon as advised by you that the merger agreement in the approved form properly certified has been filed in the office of the Secretary of State of the State of Nevada. We are convinced debentures will be deposited promptly subject to usual delay on account of holidays.

Percy H. Clark

505 pm

EXHIBIT NO. 9

Pioche, Nevada, July 24, 1943

Mr. Richard E. Dwight,
100 Broadway,
New York, N. Y.

Auditors report awaiting satisfactory evidence for stating amount of debentures outstanding when merger is completed. Stockholders adjourned hoping for prompt receipt of evidence satisfactory to auditor that settlement agreement is signed per paragraph seven or bonds deposited. Thatcher refused to guarantee bonds would be deposited.

John Janney.

EXHIBIT NO. 10

Pioche, Nevada, July 26, 1943

Richard E. Dwight
100 Broadway,
New York, N. Y.

Meeting awaits reply telegram July 24th. Auditor unable to certify amount of bonds outstanding on completion of merger because of condition contained in consents received today. Meeting will vote approval of merger when Debenture holders committee guarantees signatures secured conform to paragraph seven settlement agreement in the respect that these debenture holders have consented to the settlement agreement and are obligated as are the other debenture holders to deposit their bonds upon ratification of merger by stockholders and filing proper papers with secretary of state.

E. G. Woods, Secretary.

EXHIBIT NO. 11

[Telegram]

July 27 1943

Percy H. Clark, Esq.
1500 Walnut Street Building
Philadelphia, Pa.

Have just received following telegram from E. G. Woods secretary quote Meeting awaits reply telegram 24th. Auditor unable to certify amount of bonds outstanding on completion of merger because of condition contained in consents received today.

Meeting will vote approval of merger when debenture holders committee guarantees signatures secured conform to paragraph seven settlement agreement in the respect that these debenture holders have consented to the settlement agreement and are obligated as are the other debenture holders to deposit their bonds upon ratification of merger by stockholders and filing proper papers with Secretary of State unquote.

Richard E. Dwight.

EXHIBIT NO. 12

[Telegram]

Philadelphia Penn 122 pm July 28 1943

E G Woods, Pioche, Nev.

Committee unwilling to guaranty performance of other peoples obligations particularly when some of other people unknown to them. Committee willing to ask for present deposits on condition that debentures and scrip will be returned if reorganization not consummated. Dwight approves this. Advise whether we shall ask for deposits.

Percy H. Clark

240 pm

EXHIBIT NO. 13

Pioche, Nevada, July 28, 1943

Richard E. Dwight,
100 Broadway,
New York, N. Y.

Clark's misconstruction Company's telegram to

you July 26 serious stop meeting senses danger and discouraged by Clark's delays. Must either vote to renew litigation or else adjourn to allow time debenture-holders' Committee to fulfill requirements now over one year delay of Paragraph seven Settlement Agreement, either by securing signed consents to Settlement Agreement by those listed page two Clark's letter July ninth or else the deposit of bonds under provision of Settlement Agreement. Meeting agrees bonds to be returned if stockholders fail to ratify merger contract in form as initialed by attorneys and file proper papers with the Secretary of State to complete the merger. Can you secure satisfactory assurances by noon Saturday?

John Janney, President.

EXHIBIT NO. 14

Pioche, Nevada, July 29, 1943

Mr. Percy H. Clark,
1500 Walnut Street Bldg.,
Philadelphia, Pa.

Inasmuch as your telegram does not state whether deposit of bonds you propose would be made under the terms as set forth in settlement agreement which is now binding on all parties or made under the condition interpolated into signed consent set forth in certified copy you have sent us we have telegraphed Mr. Dwight our reply and you can confer with him.

E. G. Woods, Secretary.

EXHIBIT NO. 15

July 29, 1943

Mr. Percy H. Clark,
1500 Walnut Street Bldg.,
Philadelphia, Pa.

Dear Sir:—

I have submitted your telegram of July 28th to the stockholders' meeting, and am directed to say that it is not responsive to our telegram of July 26th to Mr. Dwight.

By referring to our telegram to Mr. Dwight of July 26th, you will see that we did not ask you to guarantee deposit of the bonds by persons who are strangers to you. We did not ask you to guarantee deposit of any bonds at all.

Inasmuch as the meeting has determined to either put through the reorganization as agreed without change in any of the contracts or else resume the litigation, we have asked that the debenture holders' committee comply with paragraph 7 of the Settlement Agreement.

This paragraph clearly sets forth the obligations your committee has assumed. We have telegraphed Mr. Dwight as follows:—(July 28th, 1943)

"Clark's misconstruction Company's telegram to you July 26 serious. Meeting senses danger and discouraged by Clark's delays. Must either vote to renew litigation or else adjourn to allow time debenture holders' committee to fulfill requirements now over one year delayed of Paragraph seven Settlement Agreement comma either by securing signed consents to Settlement Agreement by those listed

Page two letter July ninth to you from Clark or else the deposit of bonds under provisions of Settlement Agreement stop Meeting agrees bonds can be returned if stockholders fail to ratify merger contract in form as initialed by attorneys and file proper papers with Secretary of State to complete the merger stop Can you secure satisfactory assurances by noon Saturday."

The objection of the stockholders' meeting to the papers you had the non-assenting debenture holders sign is that it varies from the contract of settlement in the following respect. Namely, it adds a condition which is not set forth in the contract, and for which condition we can neither see the reason nor how to interpret it.

This condition provides that by "the opinion of your committee" it can be determined whether or not the signers to the agreement are obligated to comply with its provisions. This changes the terms of the contract which requires that the signers shall be obligated under the contract which they sign, without reference to any opinion of the committee, and it is astonishing to this meeting that such a clause should be placed in a contract where your committee has agreed to secure an unconditional obligation of the undeposited debenture holders.

It is the sense of the stockholders' meeting that the merger will not be voted with a substantial minority of bondholders having the right either in their opinion or that of your committee or anybody else to refuse to exchange their bonds when the merger is completed.

What we and the other signers have a right to demand under the contract is that the bondholders are definitely obligated to come in under the merger and have bound themselves irrevocably to do so as soon as the contract of merger is ratified by the stockholders and the proper papers filed with the Secretary of State. This the contract of settlement requires, and this is all the stockholders' meeting asks.

Very truly yours,

Pioche Mines Consolidated
By E. G. Woods, Secretary.

EXHIBIT NO. 16

Pioche, Nevada, July 30, 1943

Messrs. Percy H. Clark
Albert P. Gerhard,
Robert F. Holden,
Members of the Debenture Holders' Committee,
Philadelphia, Pa.

Gentlemen:—

As representatives of the Boston Committee of Stockholders and Creditors, the undersigned have been attending a stockholders' meeting, noticed for July 15th, which meeting has had a number of adjournments, and considerable correspondence with the attorney for the company, and there is a sad state of confusion which looks as if it will force the meeting to adjourn without approving the contract of settlement and merger, for which the meeting was called.

We have come to Pioche giving full faith and credit to the statement that the Philadelphia debenture holders' committee were proceeding, after various unnecessary delays and as they were bound to do under clause 7 of the settlement agreement, to use their best efforts to secure the consents of the minority bondholders to the plan of settlement and merger, entered into and duly signed by us and by you in July, 1942, over a year ago.

Your committee has failed to furnish the meeting with these consents. We must have, as you of course know, and as Mr. Dwight has repeatedly advised you, information sufficient for the auditor to furnish the meeting with a proforma balance sheet. The auditor is not able to certify the number of debentures that will remain outstanding when the merger is completed, and this is the most necessary figure in the balance sheet for the vote of the meeting.

The meeting was adjourned on July 15th for a report on the proxies and the consents of the creditors. When the meeting was reassembled July 19th, it appeared that the consents promised in your letter July 9th to Mr. Dwight (page 2) were not at hand. Mr. Thatcher representing your interests was present at the meeting. In order to obviate this difficulty he was asked to guarantee that the bonds listed in your letter as consenting would be deposited. Mr. Thatcher not only refused to comply with this request, but he also refused to serve upon the committee reporting on these consents, to which committee he had been appointed.

Whereupon, Mr. Thatcher was asked to send a telegram to your committee which he did, and your committee replied that you would not guarantee that the bonds would be deposited, which meant that the bonds were not obligated to be deposited. Thus the signal of caution was flashed before the meeting, and the possibility of a deception was before us such as we have previously reported to members of your committee in certain correspondence, to which you can refer if you wish to do so.

On July 20th your committee forwarded to us certified copy of what purported to be consents. These did not arrive here until July 26th. To the astonishment of the meeting the signers were not bound by the terms of the merger agreement to convert their securities, but the matter of whether or not they converted securities was to be based upon the opinion of the bondholders' committee, which opinion was no part of the original contract.

The question before the meeting, and the question for the auditor to decide thus became what was going to be the opinion of the bondholders' committee. If yes, the bonds went in,—if no, the bonds stayed out.

Whereas, the provisions of clause 7 required that the bondholders should be bound and obligated to the settlement agreement without any condition whatsoever, except that the merger should be completed as agreed to.

In the opinion of the undersigned, the debenture holders' committee has breached the settlement agreement.

To give the debenture committee a final opportunity to cure this defect, we will vote to hold the meeting open long enough to have a telegraphic reply to this letter. This because there is no one who can clear up the confusion that now stands in this situation but the debenture holders' committee who have created the confusion by failing to perform clause 7 of the settlement agreement.

You can thus clear this up if you wish to do so, and we wish on our part to place the responsibility clearly upon you as members of the debenture holders' committee for the failure of the meeting. We therefore request: (a) That you telegraph us upon receipt of this letter the names of those of the non-assenting debenture holders listed on page 2 of Mr. Clark's letter of July 9th to Mr. Dwight, who have not definitely consented to the settlement agreement by signing such papers as have obligated them to convert their debentures into securities of the new company when the merger is completed by the approval of the contracts, and filing the necessary papers with the Secretary of State. (b) Also we request that you telegraph the names of those who are definitely obligated by signed contract you have secured from them.

Another method of curing the defect is to send the meeting a contract signed by the members of the debenture holders' committee, and without any modification, that in their opinion the merger will be completed as soon as the stockholders' meeting votes the approval to the settlement agreement, and merger contract, and the necessary papers are filed with the Secretary of State of Nevada, and that this

opinion would govern and determine the condition which is contained in the papers sent us by Mr. Clark on July 20th.

It is hard for us to believe that a trick is prepared for us by causing the litigation to be dismissed, leaving a substantial group of debenture holders who are only obligated to convert their debentures upon the opinion of your committee.

The telegram requested above would remove all doubt on this question. However, please take note of the fact that both your committee and Mr. Thatcher who represented you at the meeting have refused to guarantee that these signatures would result in the conversion of the bonds, and the fact that the secretary of the company has asked that you agree that the minority debenture holders are obligated to abide by the terms of the settlement agreement which would compel them to exchange their securities, to which request the meeting has received no definite reply.

The meeting will not receive the vote of the undersigned in approval of either the merger or settlement agreement, when a substantial group of debenture holders are obligated to convert their debentures only upon an opinion of your committee, nor will we vote approval with a substantial number of debenture holders in doubt.

It must be understood that your telegram as above requested removes all doubt in the matter. We are merely asking you to guarantee by one process or the other that the signatures you obtain obligate the signers to the conversion of the bonds as soon

as the merger shall have been completed by filing the merger contract duly approved with the Secretary of State's office of Nevada.

We call upon you for this action because of the obligation you assumed under clause 7 of the settlement agreement which you signed July 8th, 1942.

Very truly yours,

Boston Committee of Stockholders
and Creditors,

/s/ By Augustus L. Putnam
Richard K. Baker.

EXHIBIT NO. 17

July 31, 1943

Mr. Percy H. Clark,
1500 Walnut Street Bldg.,
Philadelphia, Pa.

Dear Mr. Clark:—

We have this morning a telegram from Mr. Dwight from which we assume that you will secure the deposit of the bonds unconditionally and that the condition will be obviated which has been placed in the consents contrary to the Settlement Agreement. This refers to the condition which makes the exchange of the old securities for the new dependent upon the "opinion of the debenture holders' committee."

Please confirm this as your understanding.

Very truly yours,

/s/ E. G. Woods, Secretary.

EXHIBIT NO. 18

Pioche, Nevada, August 4, 1943

Debenture Holders' Committee,
P. H. Clark, Chairman,
1500 Walnut Street Bldg.,
Philadelphia, Pa.

Please telegraph total amount of bonds which you represent that are definitely committed to exchange old bonds for new under settlement agreement as soon as merger is completed by stockholders' meeting voting approval of merger agreement and filing papers as provided by Nevada Statute, also those you represent who are not definitely committed to exchange.

E. G. Woods, Secretary.

[Printer's Note: Exhibit 19 is a duplicate of Exhibit SM 13 set out at page 302.]

EXHIBIT NO. 20

[Telegram]

6 s co 90 — 84 DL 5 Exa
Philadelphia Penn 455 pm Aug 5 1943
E G Woods, Secy, Pioche Mines Cons., Inc.
Pioche, Nev.

Answering your nightletter of 5th and referring to figures in my letter of July 9 to Dwight, $596,200. Total amount of bonds represented by our committee are definitely committed to exchange old bonds

for new bonds and stock on terms set forth in agreements. If assents secured by Janney including Whitney are valid total will be increased to $684,-700. Leaving only $2600. Not yet committed, of whom we can claim to represent only Page who owns $400 of debentures.

Pioche Debenture-Holders' Committee
By Albert P. Gerhard and Percy H. Clark
930 am 6

[Printer's Note: Exhibit 21 is a duplicate of Exhibit SM1 which is set out at page 295.]

[Printer's Note: Exhibit 22 is a duplicate of Exhibit SM2 set out at page 296.]

EXHIBIT NO. 23

Law Offices Clark, Hebard & Spahr
1500 Walnut Street Building, Philadelphia 2

August 7, 1943

E. G. Woods, Secretary
Pioche Mines Consolidated, Inc.
Pioche, Nevada

Dear Mr. Woods:

Your night letter of the 6th reached me this morning. You will find confirmation of my reply enclosed.

I wrote you on August 5 setting forth the Committee's opinion as to the correct interpretation of the letter of assent, but sent my letter to Mr.

Dwight with the request that he forward it to you if he thought it would be helpful. I have just been talking to his secretary and learn he left town yesterday without seeing my letter and is not expected back until late Monday afternoon. I then requested her to forward the original of my letter of the 5th to you by today's airmail and you should receive it at the same time as this letter.

Very truly yours,

/s/ Percy H. Clark.

PHC:mac—Enc

EXHIBIT NO. 24

Pioche, Nevada, August 7, 1943

Debenture Holders' Committee,
c/o Percy H. Clark,
1500 Walnut Street Bldg.,
Philadelphia, Pa.

Dear Sir:—

Herewith confirmation of our telegram of August 7th.

> "When may we expect reply of your committee to our letter of July 30th. Answer by Western Union."

We are still awaiting your reply to our letter addressed to your committee under date of July 30th. The stockholders' meeting is still awaiting a definite answer to two questions which were asked you in a telegram which the meeting directed Mr. Woods to send you under date of August 4th.

Speaking for the Boston committee we would say that your failure to answer these two very definite questions is unnecessarily delaying the procedure of our meeting, and is a failure to recognize your obligation under the contract you have signed on July 8th, 1942.

The stockholders' meeting was delayed being called because of your failure to provide consents as agreed, and the meeting now assembled is being delayed because the consents obtained, copies of which arrived July 26th, are conditional consents not in accord with the agreements, and which have created confusion and uncertainty in the mind of the stockholders' meeting as to whether the company would become insolvent upon voting favorably on the settlement agreement and merger agreement, because the meeting does not know how many debentures will be outstanding and continue an obligation of the company. Of course you realize that this is a breach of the contract.

There was no intention that the stockholders' meeting should approve either of these contracts until after it was definite that the debenture holders would accept the new securities, and the time when the debenture holders are obligated to accept new securities is just as important to the meeting as the time when the litigation is dismissed. If the debenture holders are obligated to convert old securities for new upon the consummation of the merger it must be agreed by all parties when the consummation of the merger takes place, and whether it is in accordance with Nevada law or in

accordance with the conditions you have had attached to the consents you have obtained.

Under Nevada law the reorganization is consummated when the merger contract is approved and filed. According to your consents it rests with the opinion of your committee. Your telegram of August 7th not only evades the question asked by the meeting, which could only be answered in dollars, but spreads additional confusion in two respects.

First, the debenture holders are not asked to be committed to complete the reorganization, they are being asked to accept the new securities in exchange for the old.

Second, you speak of debenture being committed when merger is consummated, and the purpose of our question was to make definite the time when the merger is consummated.

You have left the meeting to guess whether or not your evasion is deliberate and to guess why you should create additional confusion by your reply.

There is a practical question facing the meeting. We have clearly expressed the problem in the form of a question to your committee. Your various replies to the various telegrams have been read to the meeting, and in each case it is the unanimous opinion of the stockholders that you have evaded the question, and left the meeting in a position of doubt on the important item of whether or not the bonds will remain unpaid or what bonds remain unpaid after we vote in favor of dismissing the suit now pending in the Nevada courts.

In this suit there is a counterclaim against your

associate bondholders for obstructing the company in operating its properties during the last eight years. In several meetings with you our Boston group made it very clear that we would not vote to dismiss this litigation until after the bonds are committed to accept new securities upon completion of the merger.

The question we ask renders definite that the consummation of merger is a provided by Nevada law which is by voting approval and filing merger contract. We ask this to eliminate the doubt you have created which is already clear to you from previous correspondence.

The meeting assembled July 15th believing you had obtained the consents as agreed. On July 26th the meeting received papers from you varying from the terms of the contract. The obligations of the bonds were perpetuated until your committee arrived at certain opinions. As long as this opinion is in doubt the question of the obligations of the new corporation remain in doubt. We have asked you to clear up this by an expression opinion (refer to our letter of July 30th), this you have failed to do.

There must be a day when all negotiations with the bondholders will be ended. It is agreed that that day will be upon consummation of the merger. You have repeatedly evaded the question that has been asked your committee which is intended to save time by committing your committee to a definite statement which cures the defect of the condition in your consents, and cures the breach of paragraph 7

of the settlement agreement. You have neither secured the deposit of the bonds unconditionally (except as provided in the contract) nor secured a binding contract to relieve the company of the obligations of those bonds at the time of consummation of the merger.

The purpose of this letter is to make a record which again brings before your committee the position of the Boston Committee of stockholders and creditors, and we believe that this letter finally discharges all obligation due to innocent minority bondholders whom you may represent.

Our final request is that you answer the questions asked you by the secretary of the meeting on August 4th, so that the meeting will know the number expressed in dollars that represent the bonds which are committed to exchange as soon as the merger is voted and papers properly filed, and the number which is not committed.

The only answer to this question that can be considered satisfactory is an answer to be expressed in dollars, and that applies also to the previous question. In asking the question we are giving you the opportunity to cure your neglect to perform as agreed under paragraph 7 of the settlement agreement which in the opinion of our committee you have breached. We are also giving you an opportunity to end your delaying carrying out these contracts.

Any further evasion of this question will be considered by us as a deliberate evasion, and we will

so construe your failure to reply to our letter of July 30th, addressed to your committee.

Very truly yours,

Boston Committee of Stockholders
and Creditors,
/s/ By Richard K. Baker.

[Printer's Note: Exhibit 25 is a duplicate of Exhibit SM3 set out at page 296.]

EXHIBIT NO. 26

Law Offices Clark, Hebard & Spahr
1500 Walnut Street Building, Philadelphia 2

August 12, 1943

E. G. Woods, Secretary
Pioche Mines Consolidated, Inc.
Pioche, Nevada

Dear Sir:

This is to acknowledge receipt of your telegram of August 10, 1943, addressed to Debenture Holders' Committee Percy H. Clark Chairman. Mr. Clark left on August 10 for his holiday and is not expected to return until after Labor Day. I shall call your telegram to his attention upon his return.

Very truly yours,

/s/ (Miss) Mary Confoy
Secretary to Percy H. Clark.

mac

[Printer's Note: Exhibit 27 is a duplicate of Exhibit SM4 set out at page 297.]

EXHIBIT NO. 28

Pioche Mines Consolidated

Pioche, Nevada, August 13th, 1943

Debenture Holders' Committee,
Percy H. Clark, Chairman
1500 Walnut Street Building,
Philadelphia, Pa.

Gentlemen:—

This will acknowledge receipt of your letter of August 5th, received yesterday, which was forwarded to us from Mr. Dwight's office in New York without comment.

I am today forwarding copy of this letter to Messrs. Putnam and Baker of Boston, and also copy to the Auditor. Not receiving satisfactory reply to letters and telegrams containing questions addressed to your committee, the meeting adjourned on August 9th for 45 days, because Mr. Putnam and Mr. Baker both had important business matters which made it impossible for them to remain longer, and the auditor returned to Boston the week previous, because of the necessity of other engagements.

It is unfortunate that this information could not have been forthcoming promptly in reply to our various inquiries bearing on this question. Meantime the auditor will no doubt feel that your letter is sufficient basis for his certification of the debts of the company to the meeting when it is reconvened as per adjournment. The motion was first made for an adjournment for thirty days, but Mr. Baker and

Mr. Putnam were unable to return earlier than the date set for the adjourned meeting, which is Thursday, September 23rd.

Very truly yours,

E. G. Woods, Secretary

EXHIBIT NO. 29

September 14, 1943

Richard E. Dwight, Esq.
100 Broadway
New York, N. Y.

Dear Mr. Dwight:—

As Chairman of the Boston Committee of stockholders and creditors, I am writing to advise that at the stockholders' meeting of the Pioche Mines Consolidated, held in Pioche, Nevada, on July 15th, a number of questions were addressed to the Philadelphia committee of bondholders and creditors in an effort to clarify the question before the meeting in approving the merger agreement.

The Boston representatives of the Boston committee of stockholders and creditors were compelled to leave Pioche, and asked for adjournment of meeting on August 9th in the absence of any satisfactory response from the Philadelphia committee to the very definite question often repeated in letters and telegrams to them, and in the absence of any reply to the letter addressed to Mr. Clark and his committee by the Boston committee of stockholders and

creditors. There has been forwarded to us from Pioche a certified copy of Mr. Clark's letter of August 5th, which was sent first to your office and forwarded from there to Pioche on August 7th, which purported to be a reply to our letter to them though addressed to Mr. Woods, secretary. This letter did not arrive in Pioche until after our departure.

There are two matters which concern the Boston committee,—first, is this letter a definite commitment that the minority bondholders are bound by the merger agreement and therefore bound to convert their old securities into new as soon as the stockholders vote approval of the contract and file the papers. This is what the letter seems to say, but this same question was so persistently evaded that we cannot but question whether the letter means to say what we construe it to say.

Second, upon the vote of the stockholders, approving the merger and the filing of the papers, would it be necessary for the company or the stockholders' meeting to have any further dealings with the Philadelphia committee of bondholders in proceeding with the business of the company connected with the completion of the merger.

This question is asked because the Boston committee would prefer to go through with the litigation than have any further dealings with the Philadelphia committee, unless it be confined to specific, definite points that will require no negotiation with them. It was our impression in signing the settle-

ment agreement that we would have no further dealings with the Philadelphia committee after the merger was completed.

Very truly yours,

/s/ Augustus L. Putnam
Boston Committee of Stockholders
& Creditors

EXHIBIT NO. 30

Dwight, Harris, Koegel & Caskey
Attorneys & Counsellors at Law
100 Broadway

New York, September 16, 1943

Augustus L. Putnam, Esq.,
64 Stanhope Street,
Boston, Mass.

Re: Pioche Mines Consolidated

Dear Mr. Putnam:

Your letter of September 14th was duly received.

Personally I have never received a satisfactory document from Mr. Percy L. Clark since my association with him, which commenced some years ago.

I am not, however, greatly worried about the minority bondholders not being bound by the agreement of merger by reason of any ambiguity in our correspondence with Mr. Clark. Now that the merger has gone through, the merged company will not recognize anyone except holders of the merged securities.

Any holder of the old bonds or old debentures

would, therefore, if he did not exchange them, have no remedy except to sue the old company on such securities. There would be no difficulty in proving that he was fully advised of the proposed merger and he would have to rely upon some ambiguity in the negotiations and correspondence in order to claim that he was not bound by the action of the security holders in carrying through the merger, and I do not think the court would have any sympathy for him.

We have prepared forms for the new securities and will forward them tomorrow to Pioche.

I can see no reason why the Boston Committee should have any further dealings with the Philadelphia Committee or the operation of the merged company.

Of course nobody can forecast the future, and at some time it might be necessary for all of the security holders to get together in connection with some proposed sale, merger, etc.

Very truly yours,

/s/ Richard E. Dwight

EXHIBIT NO. 31

September 16, 1943

Mr. Richard E. Dwight
100 Broadway
New York

My dear Mr. Dwight:

I have recently returned from my vacation and find the debenture-holders have responded very well

to our request to deposit their bonds with Fidelity. $55,000. of bonds have been deposited and the holders of $7,000. of additional bonds have promised to deposit shortly. Billy Forbes is in the South on his vacation but has promised to deposit his $5,000. of bonds immediately after his return on September 20. Mrs. Whitney has promised to deposit her $1,000. as soon as she returns shortly after October 1. This accounts for $62,000. of the $67,100. of bonds, the holders of which have signed the assent and agreement to deposit. In addition Naylor reports that Mr. Harper has agreed to deposit the $1,000. debenture held in his father's estate, and George Page has promised to deposit the $400. of bonds held by him.

Two individuals holding $5,100. of bonds who signed the assent have not deposited and I am following them up. All of the above points to the early deposit of all of the outstanding bonds held by the Philadelphia group. If John Janney will arrange for the deposit of the bonds on his list, it seems Fidelity will hold 100% of the outstanding debentures available for exchange under the plan as soon as the Pioche Companies perform their part of the obligations imposed upon them by the Agreement of Settlement.

When do you expect the accountants to furnish the necessary balance sheets and certificates? We can see no reason why there should be further delay in consummating the reorganization. We certainly are doing our part.

Very truly yours,

Percy H. Clark

PHC:mac

EXHIBIT NO. 32

Pioche, Nevada, September 20—43

Mr. Percy H. Clark,
Chairman Debenture Holders' Committee,
1500 Walnut Street Bldg.,
Philadelphia, Pa.

For the purposes of adjourned meeting twenty third please certify amount of bonds legally obligated to exchange old securities for new obligation binding as soon as company votes approval of merger agreement and papers are filed with secretary of state's office in conformity to Nevada statute. Boston committee has been advised by company attorney that your position needs clarifying because of conflicts and inconsistencies between your recent communications to the company and communications to company's attorneys.

Pioche Mines Consolidated.

EXHIBIT NO. 33

Pioche, Nevada, September 21, 1943

Hartshorn and Walter,
50 Congress Street,
Boston, Mass.

We have today copy letter dated September 16 Percy Clark to Richard Dwight reporting bonds represented by their committee are now nearly all deposited with them. We believe you can get certificate from Clark committee now which specifies

number of bonds their group represents which will remain outstanding after meeting of stockholders votes ratification of merger agreement and files papers with secretary of state. Which event defines date of balance sheet of merged company. Meeting already satisfied all bonds Janney represent will be converted as represented. Meeting will adjourn awaiting your action. Please confer with Putnam and Baker for full particulars, relating Boston committee.

Pioche Mines Consolidated

EXHIBIT NO. 34

Pioche, Nevada, September 22, 1943

Percy H. Clark, Chairman,
Debenture Holders' Committee,
1500 Walnut Street Bldg.,
Philadelphia, Pa.

From your letter dated September 16th received today we presume that your committee is now in position to certify to auditor the amount of bonds on your list. That will remain outstanding upon consummation of merger.

Pioche Mines Consolidated.

EXHIBIT NO. 35

[Telegram]

Philadelphia Penn 110 pm Sept 23 1943

Pioche Mines Consolidated Inc., Pioche Nev.

All bonds on committees list have been deposited except $4100 which have been definitely promised in writing and committee certifies none of the bonds

on its list will remain outstanding when merger and reorganization provided for in agreements are consummated.

Debenture Holders Committee
By Percy H Clark, Albert P Gerhard

215 pm

EXHIBIT NO. 36

[Telegram]

17 x co 18—16

Philadelphia Penn 457 pm Sept 23 1943

Pioche Mines Consolidated Inc., Pioche Nev.

Forbes has just deposited additional $3,000 of bonds reducing outstanding bonds on our list to $1,100.

Percy H Clark

516 pm

EXHIBIT NO. 37

Pioche, Nevada, September 24, 1943

Debenture Holders' Committee,
Percy H. Clark, Chairman,
1500 Walnut Street Bldg.,
Philadelphia, Pa.

Stockholders' meeting assumes from our telegram of August 10th and your reply thereto taken with your telegrams of yesterday that you are now in position to certify to the auditor what bonds on your list will remain outstanding when merger is consummated. The sense of the present meeting is that if merger agreement receives necessary ratification of stockholders' meetings and all three com-

panies properly certify same to Secretary of State of Nevada, so as to constitute under Nevada law consummation of the merger, that the new company will start business with no cash obligations to bondholders on your list except possibly $1100 not yet deposited, all others being obligated to convert old securities into new as provided in settlement agreement. Meeting requests that you certify this fact to the auditing firm in language satisfactory to them so they can complete balance sheet which positively and definitely must state the nature of the obligations of the new company when formed. Meeting is ready to proceed upon receipt from auditor of the proforma balance sheet.

Pioche Mines Consolidated.

EXHIBIT NO. 38

[Telegram]

Philadelphia, Penn. 1258 pm Sept. 25, 1943

Pioche Mines Consolidated, Inc., Pioche, Nevada

Your nightletter received in my opinion stockholders cannot change rights of creditors and vote of stockholders approving merger and filing of merger will not satisfy claims of holders of deposited debentures or other creditors who will continue as creditors of surviving company after the merger until consummation of the reorganization by exchange of old securities for new for this reason our committee cannot sign certificate you desire and I cannot believe Janney will sign such a certificate relating to claims of debenture holders on his list and other creditors nor should accountants certify a balance

sheet based on such false certificate. However our committee and holders of deposited debentures are obligated to surrender their deposited debentures in exchange for new securities on the terms set forth in the settlement agreement and will continue to be obligated in favor of surviving company should the merger be consummated see section 40 Nevada General Corporation law first proviso. I believe Pioche companies can safely consummate the merger forthwith if they can perform the obligations imposed upon them by the settlement agreement if they have doubts concerning this why not have stockholders approve settlement and merger agreements and adjourn for say thirty days defer filing merger agreement until all parties to settlement agreement perform their obligations simultaneously at a settlement to be arranged in accordance with usual practice in similar cases note second proviso to section 40. Have no doubt Dwight will concur in foregoing opinion but have been unable to reach him or Shaw today by phone writing air mail.

Percy H. Clark

EXHIBIT NO. 39

Law Offices, Clark, Hebard & Spahr,
1500 Walnut Street Building, Philadelphia 2

September 25, 1943

Pioche Mines Consolidated, Inc.
Pioche, Nevada

Gentlemen:—

This will confirm my day letter of today, a copy

of which I enclosed. You will also find enclosed copy of an office memorandum which I dictated yesterday and sent to Mr. Dwight. I believe you have been acting under a misapprehension of the law. The obligations imposed on the several parties by the settlement agreement are mutual obligations and there should be a round-the-table settlement arranged for at which all parties can perform simultaneously the several obligations imposed upon them. Fidelity Trust Company has issued receipts for the deposited bonds which that company holds as depositary under the Debenture-Holders' Agreement. These bonds are pledged as collateral for the amounts loaned by Fidelity to the Debenture-Holders' Committee to pay expenses. I cannot see how anyone can expect Fidelity to give up the deposited bonds or cancel them until it receives the new securities to which the holders of the outstanding receipts are entitled and in addition the necessary funds to pay the expenses and Fidelity's fee. The Debenture-Holders' Agreement was incorporated by reference into the settlement agreement and I can not see how the reorganization can be consummated except through a settlement which is the usual practice in such cases. No one has suggested to me any other method of consummating this transaction.

Very truly yours,

/s/ Percy H. Clark

EXHIBIT NO. 40

September 30, 1943

Mr. Percy H. Clark,
1500 Walnut Street Building,
Philadelphia, Pa.

Dear Sir:

We ask that you will have the members of the debenture holders' committee note their approval and confirmation of telegram of September 25th, and your letter of confirmation and memorandum of the same date, that the record of the stockholders' meeting now in session may show that these statements are approved by the debenture holders' committee.

By order of Stockholders' meeting.

Respectfully,

Pioche Mines Consolidated, Inc.

By /s/ E. G. Woods, Secretary

EXHIBIT NO. 41

September 30, 1943

Fidelity-Philadelphia Trust Co.,
Walnut Street,
Philadelphia, Pa.

In the Matter of: Fidelity-Philadelphia Trust Co. v. Pioche Mines Consolidated, et al.

Gentlemen:—

You will remember that in June 1942, when the depositions of representatives of Fidelity-Philadelphia Trust Company, and deposition of Percy H.

Clark were being taken, the depositions were interrupted by a proposal from your attorney Mr. Clark that the whole matter could be settled in twenty minutes if we would only talk to him. It is now nearly sixteen months since that date. We are attempting to complete the settlement arrived at in the evening of that day. One provision was that certain securities would be exchanged as soon as a new company could be set up.

The meeting of stockholders now in adjourned session since July 15th is informed that you hold certain bonds of this company on deposit subject to exchange for bonds of the merged company on the consummation of the merger. The meeting is ready to vote the approval of the merger agreement and file same which as provided by Nevada law constitutes the consummation of the merger.

The meeting instructs me to submit to you their offer to proceed to vote the approval of the merger agreement and file same according to law which they are prepared to do and to deliver the new securities as provided in the settlement agreement. We hereby offer to do this upon receipt from you of a statement confirming that you are authorized upon delivery to you of the new securities in proper order to deliver for cancellation to us in exchange therefor the old bonds as provided in the settlement contract. We request such a statement, specifying the names and amount of bonds you are prepared to exchange.

We are informed by Mr. Percy H. Clark that you are in position of depositary of the bonds, but he

writes us, while acting as your attorney in the above case, that until certain conditions are complied with which have not been made condition precedent under provisions in the contract, you will not conform to the requirements thereof as to exchange of securities as provided therein.

All parties to the contract when it was drawn were considered and still are responsible parties. No such preferments as Mr. Clark requires are provided for in the contract. It was clearly intended that the parties would without delay fulfill their respective agreements at the proper time and in proper order. We call to your attention that these agreements of the various parties by the terms of the contract are not coordinated and are therefore collateral. That is to say each party must perform his part of the contract and each is responsible therefor, and nothing to the contrary is provided in the contract.

The construction of Mr. Clark constitutes a breach of the contract as it was represented to, and approved by, the Directors of the several merged companies. The Nevada law specifically provides that the Directors of any company, party to the merger, may withdraw at any time before the final vote of stockholders. The risk of such withdrawal is thrown into the situation by Mr. Clark's threat not to go forward with the contract as was the intent at the time it was approved by these directors.

It is therefore expedient that we immediately have from you a statement that you hold bonds subject to exchange according to the terms of the contract as

drawn with the intent as it was approved by the Directors of the merged companies.

If you hold bonds subject to fees due you from the bondholders you can hold the new bonds for your protection subject to the payment thereof, and we respectfully refer you to the provisions of the contract of settlement as to how funds are to be provided to cover the necessary expenses of the reorganization. This must be from the sale of preference notes which cannot possibly be issued except by the merged company, which must be formed and officered before the notes can be issued or executed.

This letter is intended as an offer to you to deliver the new bonds and stock in accordance with the settlement agreement, and we ask that you advise us if you can and will deliver the old bonds which you hold in exchange therefor, in accordance with the provisions of the settlement and merger agreements, copies of which are herewith enclosed.

Respectfully,

Pioche Mines Consolidated, Inc.,

By /s/ John Janney, President.

jj/gq. enc.

EXHIBIT NO. 42

October 1, 1943

Fidelity Philadelphia Trust Co.,
Broad & Walnut Streets
Philadelphia, Pa.

Gentlemen:—

Will you kindly attach to our letter of yesterday

the enclosed copies of agreements, first, agreement dated the 8th of July, 1942, known as the Settlement Agreement, and second, agreement of the 23rd of October, 1942, known as the merger agreement.

For your convenience I enclose extra copies of these two agreements.

Very truly yours,

Pioche Mines Consolidated, Inc.

By ....., Secretary

EXHIBIT NO. 43

October 1, 1943

Pioche Debenture-Holders' Committee
Percy H. Clark, Chairman
1500 Walnut Street Building
Philadelphia, Pa.

Gentlemen:

In the course of preparing the pro-forma balance sheet of Pioche Mines Consolidated, Inc., we asked your Committee, in a letter dated September 22, 1943, to certify to us the following information:

> Number of debentures of the old company which your Committee represents which will remain outstanding upon ratification of merger agreement by stockholders and filing the necessary papers with Secretary of State of Nevada.

At the same time, we sent a similar request to Mr. John Janney in regard to the debentures which he represents. We have received a certification from Mr. Janney that all debentures which he represents are committed to accept new securities for old when the foregoing events have taken place and that none will remain outstanding.

We have not yet received a reply from your Committee to our letter to you, but we did receive a letter from Mr. Percy H. Clark stating that we were under a misapprehension relating to the legal effect of the proposed Pioche merger, and we have so reported to the Company. In order that we may complete the pro-forma balance sheet, we would like to have the Debenture-Holders' Committee, as a Committee, certify to us the following information:

Number of debentures represented by the Debenture-Holders' Committee which are committed to accept new securities for old when the above events have taken place.

Very truly yours,

Hartshorn & Walter

FAS:C

EXHIBIT NO. 44

October 4, 1943

Percy H. Clark,
Albert P. Gerhard,
Robert F. Holden,
Debenture Holders' Committee,
Philadelphia, Pa.

Gentlemen:—

For your information we report our reply to auditor's request for a certificate stating the bonds and obligations of our group that will remain outstanding after the merger agreement is approved by stockholders' meeting and filed as required by law.

The following is a copy of the telegram:—

"Replying to your letter of September 22nd I hereby certify that all bondholders on my list are definitely committed to accept new securities for old upon ratification of merger agreement by stockholders' meeting and filing papers with secretary of state, and none will remain outstanding because they have all executed power of attorney authorizing attorney to accept new securities for old when offered. This of course does not include Forbes and Whitney. Clark has negotiated with them. Same applies to stockholder creditors on my list. Letter of confirmation follows."

On September 26th we received a lengthy day letter telegram dated September 25th, signed Percy H. Clark, from which we quote the following sentence:—

"Our committee cannot sign certificate you desire, and I cannot believe Janney will sign such a certificate relating to claims of debenture holders on his list, and other creditors, nor should accountant certify a balance sheet based on such FALSE CERTIFICATE."

A letter also dated September 25th is received signed by Percy H. Clark in which Mr. Clark advises that the debentures you represent will not be exchanged as your letter of August 5th implies will be done.

We ask that you reconcile this with your letter of August 5th and your answer to our telegram of August 10th.

Our meeting is still waiting to vote upon the merger agreement and stockholders' meeting requires

an auditor's certificate that shows what debts will remain outstanding after the merger is consummated.

This requires that the status of the debts of the merged company shall be made definite as of the day it starts business.

Your explanation is necessary for the reason that the letter from Mr. Clark of September 25th constitutes notice that your contract will not be completed, but that new negotiations will be undertaken after the new company is formed.

We call to your attention that it was at Mr. Clark's insistence as chairman of your committee that the merger agreement was drawn not as a reorganization but as a merger.

You are aware that the Pioche Mines Company creditors and other creditors have given their consents based on the understanding that they take securities in a merged company which has specifically limited obligations except for the 30 year notes and bonds. Mr. Clark would violate the basis of these consents.

We have been ready to proceed with this merger since August, 1942, and have been continually delayed in these proceedings and the stockholders' meeting now in session requires me to have you bring these delays to an end. Accordingly we have written to the Fidelity-Philadelphia Trust Company as per enclosed copy.

Respectfully,

Pioche Mines Consolidated, Inc.,

By ....., Secretary

EXHIBIT NO. 45

Law Offices, Clark, Hebard & Spahr
1500 Walnut Street Building, Philadelphia 2

October 5, 1943

Pioche Mines Consolidated Inc.
Pioche, Nevada

Gentlemen:

This will acknowledge receipt of your letters of September 30 and October 1 addressed to Percy H. Clark. You will find enclosed the Committee's approval and confirmation of the telegram and letter dated September 25. This approval is signed by Messrs. Gerhard and Clark on behalf of the Committee. Mr. Holden is still absent from the city and not attending to any business although I am told he is very much better.

Very truly yours,

/s/ Percy H. Clark

PHC:mac. Enc.

EXHIBIT NO. 46

Pioche Mines Consolidated, Inc.
Approval and Confirmation of
Pioche Debenture-Holders' Committee

October 5, 1943

Pioche Debenture-Holders' Committee under Debenture-Holders' Agreement dated February 1, 1939

hereby approves and confirms the telegram dated September 25, 1943 and the letter of the same date confirming the telegram, both addressed by Percy H. Clark to Pioche Mines Consolidated, Inc., and also the office memorandum dated September 24th enclosed with said letter.

Pioche Debenture-Holders' Committee

By /s/ Percy H. Clark
/s/ Albert P. Gerhard

EXHIBIT NO. 47

Pioche Mines Consolidated, Inc.
Certificate of Debenture-Holders' Committee

October 5, 1943

Pioche Debenture-Holders' Committee under Debenture-Holders' Agreement dated February 1, 1939 hereby certifies that all debentures which it represents are committed to accept new securities for old on the terms and conditions set forth in Agreement of Settlement dated July 8, 1942 and form of Merger Agreement as approved upon ratification of Merger Agreement by the stockholders and the filing of the necessary papers with the Secretary of State of the State of Nevada provided the reorganization is consummated on or before December 31, 1943.

Pioche Debenture-Holders' Committee

By /s/ Percy H. Clark
/s/ Albert P. Gerhard

EXHIBIT NO. 48

Fidelity-Philadelphia Trust Company
Philadelphia, Pennsylvania

October 5, 1943

Pioche, Mines Consolidated, Inc.
Mr. John Janney, President
Pioche, Nevada

Re: Fidelity-Philadelphia Trust Company v. Pioche Mines Consolidated, et al.

Dear Sir:

We acknowledge receipt of your letter of September 30, 1943 with reference to the above-captioned matter.

Copies of the settlement and merger agreements mentioned in the last paragraph of your letter were not enclosed. Please send them to us. Meanwhile, we have requested Pioche Mines Consolidated, Inc. Debenture Holders Committee to issue instructions pursuant to the provisions of the Debenture Holders Agreement that will enable us to comply with your request. As soon as such instructions are received we will furnish a certificate.

Very truly yours,

/s/ H. W. Latimer, Assistant Secretary

HWL:EN

EXHIBIT NO. 49

October 12, 1943

Hartshorn & Walter,
50 Congress Street,
Boston, Mass.

Gentlemen:—

We acknowledge receipt of your letter of October 6th, enclosing certificate from the Philadelphia debenture holders' committee signed by Clark and Gerhard. We note that they certify they will accept new securities for old on "terms and conditions" set forth in agreement of July 8th. We do not presume that you could certify what the conditions are, and the stockholders' meeting would not wish to vote the approval of the contract where the change of securities was conditional, unless it was set forth in precise terms just what the conditions were.

The matter is not clarified by the modifying clause referring to the settlement contract, as there are no conditions in the settlement contract set up as precedent to the exchange of securities. In other words all the provisions in the contract are predicated upon the new company being formed and the debts of the old company being refinanced. There are no conditions precedent in the contract for the conversion of securities.

It therefore does not appear either how you can certify or how the stockholders' meeting can vote with any intelligence or convictions as to the matter in question. It seems to me that all you can certify to would be that the securities will not be accepted

except subject to conditions which are implied but not stated in the information you have from the debenture holders' committee.

Very truly yours,

Pioche Mines Consolidated, Inc.,

By /s/ John Janney, President.

jj/gq.

EXHIBIT NO. 50

October 12, 1943

Fidelity-Philadelphia Trust Co.,
Broad & Walnut Streets
Philadelphia, Pa.

Gentlemen:—

The stockholders' meeting now in session is disappointed in not receiving before this information asked for in our letter of September 30th, to the end that the meeting might vote on the ratification of the merger agreement, based upon receipt from you of the following information:—

1. The names and amounts of the bondholders who have deposited bonds with you, with authority to exchange old securities for new on presentation of new securities in proper form and order "immediately after the completion of the merger."

2. The names of the bondholders who have deposited their bonds with you which will be carried over as an obligation of the merged company subject to further negotiations or future agreements.

Our meeting has adjourned for ten days until October 22nd, to give time for you to receive the

necessary instructions from debenture holders whom you represent that you may give us the above information as a basis for stockholders' proceedings.

I am instructed to advise you that signatures of a large number of creditors who occupied a prior position to debenture holders as to certain important assets have been secured, based on the representation of attorneys that practically all of the other debts would be converted as of the date of the new company starting business.

By Order of the Stockholders' Meeting.

Respectfully,

Pioche Mines Consolidated, Inc.,

By ....., Secretary

EXHIBIT NO. 51

Fidelity-Philadelphia Trust Company
Philadelphia, Pennsylvania

October 18, 1943

Mr. E. G. Woods, Secretary
Pioche Mines Consolidated, Inc.
Pioche, Nevada

Re: Pioche Mines Consolidated, Inc.
Debentures, etc.

Dear Mr. Woods:

In accordance with our letter of even date addressed for the attention of Mr. Janney and following request in your letter of October 12, 1943, "we enclose list of depositors of Pioche Mines Consolidated, Inc. Debentures which you will note has been segregated to show depositors of debentures and

scrip who have retained the right to withdraw their deposits unless conditions set forth in the settlement agreement dated July 8, 1942, have been fulfilled on or before December 31, 1943, including the merger as provided for in the merger agreement dated October 23, 1942."

As pointed out to Mr. Janney, the list is furnished merely for purposes of information and cannot be used as an authorization to register new securities in the names of the depositors for the reasons stated in the afore-mentioned letter to Mr. Janney.

Also enclosed is bill for our services as Trustee under the agreements dated January 2, 1929 and October 1, 1930, providing for the issuance of the two issues of debentures, from December 1931 up to and including the final closing upon consummation of the proposed merger and settlement agreements and the receipt and delivery of debentures and coupons for cancellation and cremation, and satisfaction of the aforesaid debenture agreements, for which we expect to receive payment in cash.

Very truly yours,

H. W. Latimer, Assistant Secretary

HWL:EN

EXHIBIT NO. 52

From Fidelity-Philadelphia Trust Company, 135 South Broad Street, Philadelphia, October 18, 1943, Corporate Trust Dept.

To Pioche Mines Consolidated, Inc., Pioche, Nevada.

For services as Trustee under Agreements dated

January 2, 1929 and October 1, 1930, providing for the issue of Five Year 7% Convertible Debentures and Convertible 7% Sinking Fund Gold Debentures, respectively, of Pioche Mines Consolidated, Inc. from December 9, 1931 to final closing incident to proposed merger and settlement agreements, including the receipt and delivery of Debentures and coupons for cancellation and cremation and the satisfaction of aforesaid Debenture Agreements. $7,500.00

Received Payment,

Fidelity-Philadelphia Trust Company

By .....

EXHIBIT NO. 53

Fidelity-Philadelphia Trust Company
Philadelphia, Pennsylvania

October 18, 1943

Pioche Mines Consolidated, Inc.
Mr. John Janney, President
Pioche, Nevada

Re: Pioche Mines Consolidated, Inc. Debentures, etc.

Dear Sir:

We acknowledge receipt of your letter of October 1st and confirm that we have received the merger and settlement agreements mentioned as enclosed with your letter of September 30th. We also received your letter of October 9th stating that the stockholders' meeting is awaiting information re-

quested in your letter of September 30th and asking for the denominations of the bonds to be exchanged.

We have not yet received from the Debenture Holders' Committee the instructions requested pursuant to the provisions of the Debenture Holders' Agreement, as stated in our letter of October 5, 1943, and are, therefore, unable to give you the certification contemplated.

We have another letter from Mr. E. G. Woods, Secretary of Pioche Mines Consolidated, Inc., dated October 12th, referring to your letter of September 30th to which, for the reason above stated, we cannot respond as yet.

With the thought it might facilitate your proceedings, we have prepared as depositary for the Debenture Holders' Committee and are sending to Mr. Woods a list of the depositors of debentures merely for purposes of information and have expressly stated to him that the list shall not be construed as an authorization to register new securities in the names of the depositors for the reasons:

(a) a number of the receipts were issued years ago and title or interest therein has changed in numerous instances so that the issue of new securities in the names corresponding with those of the receipts would cause unnecessary complications and transfer tax expense in delivering new securities to the rightful owners,

(b) the deposited debentures are pledged as collateral for a loan made by Fidelity-Philadelphia Trust Company to the Debenture Holders' Commit-

tee, which loan must be paid in cash before the collateral is released.

Very truly yours,

H. W. Latimer, Assistant Secretary

P. S. Since dictating the above letter, we have just received response from the Debenture Holders' Committee to our request for instructions and enclose herein a copy.

MSA:EN

EXHIBIT NO. 54

October 18, 1943

Fidelity-Philadelphia Trust Company, Depositary under Pioche Debenture-Holders' Agreement dated February 1, 1939

Gentlemen:

This will acknowledge receipt of your letter requesting instructions from the undersigned Committee setting forth the conditions under which the deposited securities may be released.

The Settlement and Merger Agreements provide for the issue of income bonds, income notes and preference notes and the transfer of title to the properties held in trust by John Janney immediately after the merger. Obviously the new securities can not be issued prior to the merger. The settlement contemplated by the Settlement Agreement should be held immediately thereafter for the performance of the various obligations assumed by the several parties to the agreements.

The undersigned Committee is prepared to per-

form the obligations assumed by it and has instructed its attorney to arrange the time, place and details of the settlement with the attorneys representing the other parties to the two agreements.

We understand you are sending the names and amounts of the bondholders who have deposited bonds to Pioche Consolidated by air mail in order that it reach there in time for the adjourned meeting of the stockholders on the 22nd.

Very truly yours,

Pioche Debenture-Holders' Committee

By /s/ Percy H. Clark
/s/ Albert P. Gerhard

mac

EXHIBIT NO. 55

Law Offices, Clark, Hebard & Spahr
1500 Walnut Street Building, Philadelphia 2

October 18, 1943

Pioche Mines Consolidated Inc.
Pioche, Nevada

Attention: E. G. Woods, Secretary

Gentlemen:

You will find enclosed approval and confirmation by the Debenture-Holders' Committee of our telegram of August 13 sent in reply to your telegram of August 10.

The Debenture-Holders' Committee has asked me to state in reply to your letter of October 4 that they can see no conflict between my letter of Sep-

tember 25 and the Committee's letter of August 5. The Committee has been bound and will continue to be bound after the consummation of the merger to exchange the deposited bonds for new securities upon the consummation of the reorganization. The Settlement Agreement and also the Merger Agreement contemplate the exchange of securities at a settlement to be held immediately after the consummation of the merger. Note the Merger Agreement provides that the surviving corporation immediately after the consummation of the merger shall issue the income bonds, income notes and preference notes and the Settlement Agreement provides for the transfer of the properties held in trust by John Janney at the same time. That the Committee is prepared to perform the obligations assumed by it is confirmed as Depositary, setting forth the conditions under which the deposited securities may be released. You will receive copy of these instructions from Fidelity.

The Committee can see no difficulty about establishing the status of the debts of the surviving company when it starts business which will be immediately after the settlement. The accountants' certificate should show the status of the debts at that time.

I hope this will clear up the doubts expressed by your letter of the 4th.

Very truly yours

/s/ Percy H. Clark

Approved

Albert P. Gerhard

*F*HC:mac. Enc.

EXHIBIT NO. 56

Law Offices, Clark, Hebard & Spahr
1500 Walnut Street Building, Philadelphia 2

October 18, 1943

Pioche Mines Consolidated, Inc.
Pioche, Nevada
Attention: E. G. Woods, Sec'y

Gentlemen:

In response to request contained in your letter of October 8, 1943, we hereby confirm our telegram of August 13 reading as follows:

"Answer your telegram of August 10 is yes."

Pioche Debenture-Holders' Committee
By /s/ Percy H. Clark
/s/ Albert P. Gerhard

PHC:mac

EXHIBIT NO. 57

November 3, 1943

Fidelity Philadelphia Trust Company
Philadelphia, Pa.

Gentlemen:—

Your letter of October 18th has received the attention of the adjourned meeting of stockholders. The meeting was unanimous in the view that your letter is evasive and not responsive to our question. We therefore quote from our letter of October 12th, as follows:—

"The stockholders' meeting now in session is disappointed in not receiving before this information asked for in our letter of September 30th, to the end

that the meeting might vote on the ratification of the merger agreement, based upon receipt from you of the following information:—

1. The names and amounts of the bondholders who have deposited bonds with you, with authority to exchange old securities for new on presentation of new securities in proper form and order "immediately after the completion of the merger".

2. The names of the bondholders who have deposited their bonds with you which will be carried over as an obligation of the merged company subject to further negotiations or future agreements."

We have also before the meeting a letter from the debenture holders' committee giving their written confirmation to an answer which was sent to our telegram of August 10th, which we quote as follows:—

"In re your telegram seventh if auditor will certify that the bonds represented by your committee are obligated to accept new securities for old in accordance with terms of settlement agreement, obligation effective as soon as merger is consummated by stockholders approving merger contract and filing same with secretary of state, would that conform to your authority and bind your debenture holders as implied in your telegram of August fifth. Please answer yes or no."

The answer to this telegram was "Yes".

The debenture holders' committee has advised us that you are depositary to the bonds referred to in this telegram, which are held subject to exchange and we repeat our offer to consummate the merger

in accordance with the terms of the settlement agreement. The bonds which were subject to immediate conversion, as set forth in the telegram, which you hold must be made definite and the bonds which will remain obligations of the company subject to further negotiation must be made definite if the stockholders' meeting can give an intelligent vote on the issue before them.

There were certain creditors who had advanced large sums of money who held a prior claim to the assets of the Pioche Mines Company and the consent of these creditors with the prior claims to assets was secured by the representations of your attorney that immediate conversion of the bonds represented by the debenture holders' committee would be made upon the consummation of the merger, and the contract so provided.

The contract also provides how the funds are to be provided which must be paid out in connection with the merger. Since you are parties to the litigation you of course have copies of the settlement agreement, nevertheless we have sent you copies with our former communications. We appeal to you for your cooperation in making it possible to immediately consummate the merger and go forward with the business before us.

By order of the stockholders' meeting.

Respectfully,

Pioche Mines Consolidated, Inc.,

By /s/ E. G. Woods, Secretary.

EXHIBIT NO. 58

November 8, 1943

Fidelity Philadelphia Trust Co.,
Philadelphia, Pa.

Gentlemen:—

Your second letter of October 18th addressed to the Pioche Mines Consolidated, Inc., to which you attached a letter from the Debenture Holders' Committee under date of October 18th, signed by Percy H. Clark and Albert P. Gerhard, has had the consideration of adjourned stockholders' meeting.

We note you say you have written to the debenture holders' committee and asked them to state the conditions under which the securities you hold are to be exchanged. This means that they had not heretofore given you instructions, and you will note that the letter you enclose from the debenture holders' committee still does not give you instructions requested that will enable us to go forward with the completion of the merger, and fails to conform to the conditions set forth in our telegram of August 10th to the committee and their reply.

You have sent us a list of debenture holders, but have explicitly stated that "the list should not be construed as an authorization to register new securities". This prevents us from going ahead with the issuance of new securities which must be registered because the provisions of the settlement contract require it.

The debenture holders' committee have advised us relative these bonds you hold, and we refer you

to our telegram of August 10th, and their reply "Yes" to said telegram, copies of which we have sent you.

The settlement contract provides for what is to be done in connection with the settlement, and it contains no provision which accords to the attorney for the Trust Company or the committee the right to demand meetings which the other parties to the contract must attend, and which would necessarily delay the consummation of the merger. Had such provision been incorporated in the settlement agreement it would not have been signed by the other parties.

It is too late for the debenture holders' committee to wish to draw further contracts or to make further conditions in connection with this business. The contract must be consummated in accordance with the terms of the settlement agreement as now set forth and "at the earliest possible moment" as provided thereon on page 1 of said settlement agreement.

If the debenture holders' committee wishes to review necessary papers to be passed at the time of voting or make suggestions in relation thereto without creating delays, they should have appeared at the stockholders' meeting on July 15th, and it was their duty to do this notwithstanding which they have failed to appear or to be represented.

We believe that great responsibility is being assumed by any of the parties in interest in this settlement who do not in good faith use their best efforts to facilitate the business that has been before this company since the stockholders' meeting assembled

on July 15th, which business has been obstructed or retarded by failure to give the meeting adequate confirmation as to the bonds to be exchanged.

By order of Stockholders' Meeting,

Respectfully,

Pioche Mines Consolidated, Inc.,

/s/ E. G. Woods, Secretary

EXHIBIT NO. 59

Fidelity-Philadelphia Trust Company
Philadelphia (9), Pennsylvania

November 13, 1943

Pioche Mines Consolidated, Inc.
Pioche, Nevada

Gentlemen:

We have for consideration your letters of November 3 and November 8 on the subject of the proposed reorganization of Pioche Mines Consolidated, Inc. under the settlement and merger agreements and the steps to be taken incident to consummation of the proposed transaction.

Obviously, the stockholders' meeting places much emphasis on the so-called settlement or closing which it is maintained should be held to concurrently deliver and release authorizations, documents, and securities which in a transaction of this kind are inherent. In our experience we have never encountered a proposal such as is suggested in your communication in order to obtain an objective in a reorganization proceeding. It is a well-established custom that incident to carrying out reorganization proceedings,

a point is always reached at which it is necessary for all the parties in interest to have a closing in order that the steps contemplated to be taken may be disposed of satisfactorily to all parties. We cannot conceive of a valid reason for an objection to such a method on the part of the stockholders, who themselves should want assurance that the necessary details to consummate the reorganization have been fulfilled properly.

Pursuant to your representation that the instructions given us by the Debenture Holders' Committee are not in accord with your request, we have asked that Committee to supplement its instructions of October 18, 1943 with the view of providing the mechanics to accomplish what you allege is essential to complete the merger, and in reply have received from the Committee a letter, copy of which is enclosed.

Because of the ministerial capacity in which we act as Depositary under the Debenture Holders Agreement dated February 1, 1939, our company has no discretion but must be bound by instructions given to us by the Committee. Should the procedure contemplated be at variance with what the stockholders and certain creditors allege to be needed to complete the merger, the disposition of such divergent views is a matter of reconciliation among the groups of security holders and not with the Depositary.

It will be observed from the list of depositors enclosed with our letter of October 18 that $399,100 of the Debentures of 1929 and $198,500 of the Deben-

tures of 1930 are accounted for by the Committee, leaving $77,200 principal amount of the Debentures of 1929 and $12,500 principal amount of the Debentures of 1930 to be produced in order to account for all of the Debentures issued and outstanding under the respective Debenture Agreements.

We of course wish to cooperate in every way and to the extent possible, but it must be recognized that we cannot make agreements or commitments beyond the scope of our responsibilities as Depositary.

Very truly yours,

/s/ M. S. Altemose, Vice President

MSA:GL. Enclosure

EXHIBIT NO. 60

November 12, 1943

Philadelphia Debenture Holders' Committee,
1500 Walnut Street Bldg.,
Philadelphia, Pa.

Attention Mr. Percy H. Clark

Gentlemen:—

We enclose herewith copy of our letter to the Fidelity Philadelphia Trust Company of November 8th, and wish to advise that we have received no list of debenture holders from the Trust Company or from you which will enable us to go forward with the provisions of the settlement which provides that the merged company shall issue registered income bonds, which of course must be registered in the names of those who have agreed to accept the new

bonds in exchange for old bonds.

The Trust Company sent us a list of bondholders and explicitly stated "the list should not be construed as an authorization to register new securities."

Will you kindly furnish us a list of those who have deposited debentures with you or with the Trustee with authorization to accept new securities for the old, giving the names and the amounts, so that they can be registered upon our records as required by the settlement agreement. With this list available we can go forward with the consummation of the settlement agreement by completing the merger as required in said agreement which we have been ready to do since the stockholders meeting first convened on July 15th.

We ask that you will refer us to the clause of the settlement agreement which provides that "there shall be a settlement to be held immediately after the consummation of the merger." You state in your letter of October 18th that such a provision is contained in said agreement.

It is clear that the settlement agreement provides for the conveyance of the mill site, for a lease to the office building, and for turning over the stock of the Volcano Mines Company. Documents covering these items have all been delivered to the secretary of the company to be held in escrow and turned over to the merged company immediately upon the vote of the stockholders' meeting approving the merger.

The settlement agreement requires that there shall be valid transactions as to these items, but does not

provide that such conveyance shall be approved by the debenture holders' committee. You will note that the contract provides that "the properties of these companies may AT THE EARLIEST POSSIBLE MOMENT be turned into an enterprise profitable to the creditors and stockholders." This requires the avoidance of such unnecessary delays.

Based upon the above considerations the stockholders' meeting will be adjourned to Monday November 29th, at which time the representatives of the debenture holders' committee is expected to be present, to inspect these papers, and make such suggestions as to them may appear proper.

We wish to point out that the form of certificates to accompany the filing of approved merger contract with the secretary of state has already been approved by your committee.

By Order of the Stockholders' Meeting.

Very truly yours,

.....

Secretary.

EXHIBIT NO. 61

Law Offices Clark, Hebard & Spahr
1500 Walnut Street Building, Philadelphia 2

November 16, 1943

E. G. Woods, Secretary
Pioche Mines Consolidated
Pioche, Nevada

My dear Mr. Woods:

This will acknowledge receipt of your letter of

the 12th. I have just been in conference with Mr. Altemose, Vice-President of the Fidelity-Philadelphia Trust Company and we are preparing a list of the names and addresses of debentureholders together with amounts of bonds and stocks to be used by surviving company in issuing the new securities to be exchanged at the time of consummation of the reorganization. I will forward this list to you as soon as we complete it and this should be well in advance of November 29th, the date of the adjourned meeting of the stockholders.

Very truly yours,

/s/ Percy H. Clark.

PHC:mac

EXHIBIT NO. 62

November 17, 1943

Fidelity Philadelphia Trust Company,
Philadelphia, Pa.

Gentlemen:—

Your letter of the 13th is received but you failed to make the enclosure you stated would be in your letter.

We now repeat our request which your letter evades, and we again ask you to confirm or deny the relations between yourselves and the debenture holders' committee as to certain deposited bonds referred to in telegrams which we again quote:—

"In re your telegram seventh if auditor will certify that the bonds represented by your committee

are obligated to accept new securities for old in accordance with terms of settlement agreement, obligation effective as soon as merger is consummated by stockholders approving merger contract and filing same with secretary of state, would that conform to your authority and bind your debenture holders as implied in your telegram of August fifth. Please answer yes or no."

"Answer your telegram of August 10 is yes." (Dated Aug. 13th.)

Will you please confirm or deny the correctness of this statement, as relates to yourself as depositary under the above arrangement. If it is correct please furnish us names, addresses and amounts of deposited debentures.

We bring to your attention the fact that you and the debenture holders' committee are further obstructing the operation of these properties by your delay in completing the settlement and merger agreement which provides "that surviving corporation immediately after the consummation of the merger shall issue the following securities * * * said bonds shall be registered and shall be transferable only on the books of surviving corporation."

We have called upon you as depositary to send us the names in which these securities are to be registered and you have sent us a list but advised that it is not a correct list for compliance with the contract as above quoted.

Please have available to our adjourned meeting on November 29th a correct list to whom securities

can be issued and in whose name they may be registered under the above provision of the contract insofar as you represent the debenture holders who have deposited bonds with you under this agreement. This is not a reorganization or a consolidation intended to conform to your past experience in such matters as your letter seems to imply. That form of procedure was rejected by the debenture holders' committee who required that we proceed under a statutory merger proceedings under the Nevada statute and therefore we must conform to Nevada laws in such cases made and provided.

As you already know the parties on our side refused even to negotiate any settlement to this litigation until all relevant matters for negotiation were fully and finally disposed of in a settlement agreement which the debenture holders' committee was required to sign disposing of all such details before the other parties would be called upon to consider the execution of the contract.

Your company should acquaint yourself to facts stated to you in previous letters as to your relations to this litigation being settled. You are not solely a depositary of bonds but also you are defendant in a counterclaim which alleges conspiracy between you and certain debenture holders' to retard the operation of certain mining properties. This is a settlement of litigation in which you are a party, and in which you face serious charges.

We are in the position to perform each and every one of the requirements imposed by the settlement agreement upon all the parties thereto except your

company and the debenture holders' committee, and you are now in the position of withholding from us a correct list of names, addresses and amounts of those who the new securities are to be issued to, based upon the obligation reported to us by the debenture holders' committee, as to which you are reported as acting as depositary for the old securities which are to be exchanged for new securities, and as set forth in the above quoted telegram.

By Order of the Stockholders' Meeting,

Very truly yours,

Pioche Mines Consolidated, Inc.,

By .....,Secretary.

EXHIBIT NO. 63

November 17, 1943

Messrs. Percy H. Clark,
Robert F. Holden,
Albert P. Gerhard,
Members of the Debenture Holders' Committee,
Philadelphia, Pa.

Gentlemen:—

I have just offered resolution to the stockholders' meeting which was seconded by Mr. Theodore E. Brown, copy of which may be sent to you, calling attention to the failure of your committee to properly back up your letter of August 5th, your telegram of August 13th, and previous letters, wherein you stated that you had secured the consent "unconditionally" of practically all the bondholders to the settlement agreement which binds them to accept new securities for old upon the consummation

of the merger, which obligation becomes effective upon the voting of the merger agreement and the filing of same with the secretary of the State of Nevada.

As a representative of the Boston committee of stockholders' and creditors I wish to protest your efforts to delay consummation of the merger and the failure of the Fidelity Philadelphia Trust Company to corroborate your assurances. They have failed to send us a list of the bonds to be exchanged for new securities, and this nullifies your telegram of August 13th as well as your assurances to Mr. Dwight based on which the stockholders' meeting was called.

You are fully aware that the Boston committee which has a prior claim against the assets of the Pioche Mines Company, due to past experiences, definitely refused to have any negotiations with your committee for a settlement of pending litigation until after your committee had signed such a definite contract of settlement as left nothing further to negotiation or agreement with them. The stockholders' meeting has been held up from time to time since July 15th and now it is proposed that there must be further negotiations and I invite you to refer me to any provision in the settlement agreement which calls upon us or anyone to participate in any such negotiations.

This is a statutory merger under Nevada law and not a consolidation which requires further negotiation.

The Nevada law does not call for the deeds to be

passed on the properties but it provides that the filing of the merger agreement passes the titles and you can see the ridiculous position you place yourself in when you expect the Boston committee to relinquish their prior claims upon the assets of the Pioche Mines Company by voting approval to the merger agreement with the debenture holders' committee holding out for further negotiations and benefits not provided for in the settlement agreement.

We therefore call upon you to have the Trust Company to send the list of names to whom the new securities are to be registered, or else yourselves send such a list to the stockholders' meeting with suitable evidence confirming your communications that said bondholders are committed to accept new securities under the settlement agreement.

Very truly yours,

R. K. Baker
Boston Committee of Stockholders and
Stockholder-Creditors.

rkb/gq.

EXHIBIT NO. 64

November 20, 1943

Percy H. Clark,
Robert F. Holden
Albert P. Gerhard,
Members of the Debenture Holders' Committee,
Philadelphia, Pa.

Gentlemen:—

You are hereby notified that an adjourned meet-

ing of the stockholders of the Pioche Mines Consolidated, Inc., has been set for Monday, November 29th, at 10:00 A.M., to be held at the office of the company in Pioche, Nevada. We have written you under date of November 12th, 1943, advising you of this adjourned meeting.

One of the objects of this meeting will be to inquire into the responsibility of the members of the debenture holders' committee in withholding from the meeting since July 15th information in such detail as to enable the stockholders' meeting to intelligently pass upon and proceed with the business for which the meeting of stockholders were assembled. This meeting was called after your committee had advised the attorneys for this company that you had received the consents of practically all the bondholders in your group to the settlement agreement. We are still waiting for necessary detailed information to enable us to proceed under the agreement of merger.

At the meeting adjourned to November 29th the meeting wishes to have the following information from your committee:—

1. The names of the debenture holders who have unconditionally consented to the settlement agreement, and are obligated by the provisions thereof to accept new securities for old upon the consummation of the merger, as will conform to your telegram of August 13th, and our telegram of August 10th.

2. The names of the Debenture holders who have

conditionally consented together with a specification of the conditions which would render the consents so obtained different from clause 7 of the merger agreement obligating your committee as therein provided.

3. You have notified us that the Fidelity Philadelphia Trust Company is depositary for the debenture holders who have assented to the settlement agreement. We wish to have the Fidelity Philadelphia Trust Company send confirmation of the names and amounts of deposited bonds within the meaning of your telegram of August 13th, with such detail that the newly issued securities may be registered correctly according to their authority as depositary.

4. There will be presented to the meeting for approval the form of new securities to be issued under the merger contract, a deed to the millsite, a lease to the office building, and the shares of Volcano Mines Company stock held in escrow. Your committee is expected to be present to pass upon these documents.

This is sent to you by Order of the Stockholders' Meeting.

Respectfully,

Pioche Mines Consolidated, Inc.,

By ....., Secretary.

EXHIBIT NO. 65

Fidelity-Philadelphia Trust Company
Philadelphia, Pennsylvania

November 22, 1943

Mr. E. G. Woods, Secretary
Pioche Mines Consolidated, Inc.
Pioche, Nevada

Dear Mr Woods:

In order that there may be no misunderstanding in connection with the various arrangements that have to be made covering the consummation of the Pioche reorganization, we are writing you with reference to the position of this Company as trustee under the debenture agreements dated January 2, 1929 and October 1, 1930. Practically all of our previous correspondence has been with relation to our position as depositary.

We contemplate that at the proper point in the proceedings, there will be delivered to this Company as such trustee, for cancellation, all of the debentures outstanding under both agreements and at the same time we will be requested, both by the Debenture-Holders' Committee on one hand and by the individual holders of the bonds which have not been deposited, to discontinue all of the litigation which has been pending and in which this Company as trustee is plaintiff.

We shall, of course, be very glad upon delivery of such securities and such instructions, to cancel the bonds, issue the appropriate certificates, and discontinue the litigation upon the payment to us of

our trustee's fee of $7,500. in cash, a bill for which was forwarded to you with our letter of October 18.

We understand that the attorneys representing the various parties in interest are arranging for a settlement or closing at which the necessary steps will be taken in their proper order, and as trustee under the debenture agreements we will be available to do whatever is necessary and to advise by telegraph of any action which we have taken or will be requested to take.

Very truly yours,

H. W. Latimer, Assistant Secretary.

RA

EXHIBIT NO. 66

Fidelity-Philadelphia Trust Company
Philadelphia (9), Pennsylvania

November 22, 1943

Mr. E. G. Woods, Secretary
Pioche Mines Consolidated
Pioche, Nevada

Dear Sir:

At the direction of the Pioche Mines Consolidated Debenture-Holders' Committee as expressed in their communication dated today and addressed to us as Depositary under the Debenture-Holders' Agreement dated as of February 1, 1939, we enclose a requisition containing a list of the names and addresses in which the Income Bonds and shares of stock appertaining to $582,350. principal amount of deposited Debenture Bonds shall be issued.

When such securities are issued and ready for delivery, they shall be delivered to Fidelity-Philadelphia Trust Company, Depositary, 135 South Broad Street, Philadelphia 9, Pennsylvania.

Enclosed is a copy of the communication from the Debenture-Holders' Committee above referred to, in which other information pertinent to the transaction is outlined.

Very truly yours

H. W. Latimer, Assistant Secretary

HWL:GL

EXHIBIT NO. 67

November 22, 1943

Fidelity-Philadelphia Trust Company, Depositary
under Debenture-Holders' Agreement dated as of
February 1, 1939
135 South Broad Street
Philadelphia 9, Pa.

Gentlemen:

Fidelity-Philadelphia Trust Company as trustee under the two Pioche Mines Consolidated, Inc. trust agreements has advised the undersigned Committee there are outstanding under the trust agreement dated January 2, 1929 $476,300. of debentures and under the trust agreement dated October 1, 1930 $211,000. of debentures, a total of $687,300. of debentures.

Fidelity-Philadelphia Trust Company as depositary under the Pioche Debenture-Holders' Agreement dated as of February 1, 1939 has advised the

Committee that $399,100. of the debentures outstanding under the trust agreement dated January 2, 1929 and $198,500. of the debentures outstanding under the trust agreement dated October 1, 1930, a total of $597,600. of debentures, have been deposited with Fidelity as depositary under said agreements.

Copies of the Pioche Settlement Agreement dated as of July 8, 1942, and of the Pioche Merger Agreement dated as of October 23, 1942, have been filed with Fidelity, all parties desire that the reorganization provided for by said settlement and Merger Agreements shall be consummated prior to December 31, 1943 and Pioche Consolidated has requested both Fidelity as depositary and the undersigned Committee to furnish it with a list of the names and addresses of those who have deposited debentures with Fidelity as depositary giving the amounts of income bonds and shares of stock to be issued to them respectively in exchange for their debentures upon the completion of the reorganization immediately after the consummation of the merger as provided in the Settlement and Merger Agreements.

The Merger Agreement provides for the issue of only $602,050. of income bonds against the deposited debentures. The amount of the outstanding debentures towit: $687,300, exceeds by $85,250. the amount of income bonds to be issued as provided by the agreements. This discrepancy is to be reconciled by the surrender by Pioche Consolidated at the closing of $70,000. of debentures (those held by District National Bank and Kansas City Structural Steel

Company) for cancellation against which no new securities will be issued and by the surrender to Fidelity as depositary of the non-negotiable receipt for $40,000. of deposited bonds now held by E. W. Clark & Co. This receipt is held as collateral for a loan which is to be paid by Pioche Consolidated at the final closing. Of the $40,000. of bonds represented by this receipt, $15,250. are to be cancelled without the issuance of any new securities. This cancellation together with the cancellation of $70,000. of bonds surrendered as above will reconcile the apparent discrepancy between the amount of outstanding debentures and the amount of income bonds to be issued under the agreements. Upon the payment of this loan the balance of the debentures represented by the non-negotiable receipt outstanding in the name of E. W. Clark & Co. will be credited to the following parties.

Laurence R. Lee Leesbury, Va.	$12,500.
Theodore E. Brown Brush Hill Road Milton, Mass.	2,250.
Albert P. Gerhard 1930 Land Title Bldg. Philadelphia, Pa.	10,000.
	$24,750.

These parties upon the consummation of the reorganization will be entitled to income bonds and shares of stock of surviving company on the same

terms and conditions as other owners of deposited debentures.

The cancellation of $15,250. of debentures represented by the non-negotiable receipt issued by Fidelity as depositary in the name of E. W. Clark & Co. will reduce the amount of deposited debentures against which income bonds and shares of stock of surviving company are to be issued to $582,350. There remain undeposited debentures outstanding to the amount of $19,700. together with scrip and coupons appertaining thereto, the holders of which have approved the settlement provided for in the Settlement and Merger Agreements and which are to be surrendered by Pioche Consolidated for cancellation by Fidelity as trustee at the time of the final closing. It is the understanding of the Committee that surviving company will issue the income bonds and shares of stock, to which the owners of these debentures are entitled, directed to them. This will be satisfactory to the Committee although the agreements provide the shares of stock of surviving company shall be delivered to Fidelity for the account of outstanding debentures.

It will be noted that income bonds are not issuable in any denomination less than $100. This will meet the requirements of all of the holders of deposited debentures except Theodore E. Brown who paid only $2,250. on account of his subscription to $5,000. of debentures. He will also be entitled to a fraction of a share of stock. This is a matter to be adjusted by Pioche Consolidated with Mr. Brown.

Based on the facts as above set forth, there has

been prepared at the direction of this Committee, a list of the names and addresses in which the $582,-350. of income bonds and the shares of stock appertaining thereto as provided in the Settlement and Merger Agreements shall be issued, copies of which list are enclosed.

This letter is requesting Fidelity - Philadelphia Trust Company as depositary to mail the list of names and addresses above referred to to Pioche Mines Consolidated, Inc., Pioche, Nevada, immediately together with a copy of this letter.

This will also authorize Fidelity as depositary to deliver all of the deposited debentures, coupons and scrip to Fidelity-Philadelphia Trust Company, trustee under the above-mentioned trust agreements, for cancellation upon the receipt by Fidelity of written instructions from the undersigned Committee that the terms and conditions of the settlement agreement have been fulfilled.

In our opinion, it will be necessary to have a closing settlement in Carson City or Reno immediately after the consummation of the merger or contemporaneously therewith for the consummation of the reorganization. At this settlement the debentures, coupons and scrip not already delivered to the trustee as well as all other outstanding obligations shall be delivered for cancellation.

Committee's attorneys are in correspondence with Messrs. Dwight, Harris, Koegel and Caskey representing other parties to the litigation and settlement agreement relating to details of the settlement. You will be advised further concerning these details as soon as these attorneys arrange them.

It is anticipated that these arrangements will provide that the written instructions from the undersigned Committee above referred to will be forwarded to Committee's representative at the closing settlement for delivery to the trustee or its representative at the proper time in the proceedings.

Very truly yours,

Pioche Debenture Holders' Committee

By .....

PHC:mac

EXHIBIT NO. 68

Law Offices Clark, Hebard & Spahr
1500 Walnut Street Building, Philadelphia 2

November 24, 1943

Pioche Mines Consolidated, Inc.
Pioche, Nevada

Gentlemen:

More letters have been received today from Pioche relating primarily to the list of holders of deposited debentures with amounts etc. This list went forward by airmail on Monday and you probably have it by this time.

The following is a list of the names of the debenture-holders whose consents our committee has not secured and whose debentures should be turned in at the final closing.

	1929	1930
Gilbert R. Payson (Estate of Charles E.)	$ 500.	
Lawrence R. Lee	10,000.	
Estate of Grace T. Train	1,500.	$ 1,000.
Margaret P. Chew (Estate of Roger Chew)	1,000.	
Estate of Otto U. Von Schrader	2,500.	
Elliot A. Hunt		1,000.
District National Bank	60,000.	
Kansas City Structural Steel Co		10,000.
Grace T. Whitney	1,000.	
Hooper S. Miles	100.	
Samuel L. Munson		500.
Mary Tancred	500.	
Estate of Dr. Landis	100.	
	$77,200.	$12,500.

Grace T. Whitney, the owner of a $1,000. debenture of the 1929 issue is the only one on our list whose bond has not been deposited. As explained in my letter of July 9, 1943 to Mr. Dwight, Mr. Naylor has seen Mrs. Whitney several times and she stated she would send her assent to John Janney and later that she would do whatever he told her to do, so he will have to follow up this bond. We have no influence over any of those listed in this group.

Our committee has no desire to engage in further negotiations and desires to conclude the reorganization as promptly as possible by contemporaneous performance by all parties of the obligations they have assumed.

Very truly yours,

/s/ Percy H. Clark.

PHC:mac

EXHIBIT NO. 69

[Telegram]

Philadelphia Penn 211 pm Nov 27 1943

John Janney, President Pioche Mines Consolidated, Inc., Pioche Nev.

Under signed committee representing the deposited debentures and the undersigned stockholders whose proxies you hold hope stockholders meeting will authorize merger in order that all parties may perform obligations assumed by them contemporaneously with consummation of merger. Committee has authorized Messrs Thatcher and Woodburn of Reno to arrange with you details of the settlement and to represent committee at settlement. They will also have authority to represent plaintiffs in law suit.

E Clarence Miller
Edward C Dale
Albert P Gerhard
Percy H Clark

Stockholders Pioche Debenture Holders Committee

By Percy H Clark and Albert P. Gerhard
425 pm

[Printer's Note: Exhibit 70 is a duplicate of Exhibit SM5 set out at page 297.]

EXHIBIT NO. 71

November 29, 1943

E. Clarence Miller,
Edward C. Dale,
Albert P. Gerhard
Percy H. Clark, stockholders
Pioche Debenture Holders' Committee
Philadelphia, Pa.

Gentlemen:—

This will acknowledge receipt of your telegram of the 27th. In reply I beg to advise that no proxies voting any shares represented by any of you are held by anyone now present at the stockholders' meeting. Mr. Thatcher substituted Mr. Ford who left the meeting after waiting ten weeks for the debenture holders' committee to make definite the status of the debenture holders represented by them with reference to settlement agreement. The proxy to Mr. Ford did not give him power of substitution.

The adjourned stockholders' meeting is disappointed in not having present a representative of the debenture holders' committee. An adjournment was made to November 29th with ample notice for them to have a representative present.

The meeting is still waiting for information as to which of the bonds on the list sent us by the Trust Company just received are not obligated to accept new securities under the terms of the settlement agreement.

In order to clarify this the meeting has just telegraphed the debenture holders' committee as follows:—

"In absence of confirmation from depositary and to clear up ambiguous and conflicting statements from your committee stockholders' meeting requests you to confirm or deny your letter of August fifth and telegram of August thirteenth as they apply to list of deposited debentures, which we have just received from the Trust Company."

A definite "yes" answer to this telegram will make it clear to the stockholders' meeting that the contractual status of the debentures listed by Trust Company are as set forth in the letter of August 5th and telegram of August 13th referred to.

This will enable the stockholders' meeting to give intelligent consideration to a vote on the merger contract because it will remove the doubt as to which of the debenture holders are not obligated to accept the provisions of the settlement agreement without reservation or alterations of the terms thereof.

An evasive reply would still leave this matter in doubt and will leave the meeting without definite information as to which debenture holders are not committed to the settlement agreement.

With this definite information the emergency creditors who have prior claims to certain assets can be assured of the contract being carried out as represented, and as intended when they executed same. The meeting has requested the Fidelity Philadelphia Trust Company, depositary, to confirm the statements made by the debenture holders' committee in the letter and telegram above quoted, but they

have failed to give us this confirmation as to bonds being deposited with them in accordance therewith.

With reference to Messrs. Thatcher and Woodburn of Reno arranging with the stockholders' meeting any details of the settlement in accordance with the settlement and merger agreements and to represent the debenture holders' committee as well as yourselves, I beg to advise that the meeting will be glad to have Messrs. Thatcher and Woodburn represent you and to this end the meeting has again adjourned until December 9th to give full opportunity for Mr. Thatcher to secure adequate authority to represent you and arrange details.

In order to avoid further delay please be so kind as to accord Messrs. Thatcher and Woodburn adequate authority to give the meeting full information as to which of those you represent are committed to the terms of the settlement agreement, and adequate authority to commit you to all necessary arrangements, to the end that the normal proceedings of the stockholders' meeting are not further retarded.

In conclusion permit me to state that the stockholders' meeting which convened on July 19th has been ready at all times to vote in favor of the settlement and merger agreement and to proceed with the consummation of these agreements, and have been delayed by confusing and conflicting statements from the debenture holders' committee and their failure to respond to definite requests for information which the meeting has asked for repeatedly and in definite and specific terms as a study of

the record of the correspondence between the debenture holders' committee and the stockholders' meeting will disclose.

Respectfully,

Pioche Mines Consolidated, Inc.,

President.

jj/gq.

[Printer's Note: Exhibit 72 is a duplicate of Exhibits M-6 set out at page 298, Exhibit 73 as Exhibit SM-6 set out at page 298, Exhibit 73 as Exhibit SM-8 at page 299, Exhibit 75 as Exhibit SM-9 at page 299 and Exhibit 76 is same as Exhibit SM-10 set out at page 300.]

[Printer's Note: Exhibit 77 is a duplicate of Exhibit SM-11 set out at page 300, Exhibit 78 is same as Exhibit SM-12 set out at page 302.]

EXHIBIT NO. 79

Law Offices, Clark, Hebard & Spahr
1500 Walnut Street Bldg., Philadelphia

December 29, 1943

E. G. Woods, Secretary
Pioche Mines Consolidated, Inc.
Pioche, Nevada

Dear Mr. Woods:

This will acknowledge receipt of your letter of the 21st reporting progress. You will find enclosed copy of my letter of today to Mr. Dwight which is self-

explanatory. The preparation of agenda for the settlement prior to the settlement will, I am sure, greatly facilitate the closing and hope Mr. Janney will take this matter up with Mr. Thatcher or authorize Mr. Dwight to make arrangements with me whichever will best suit his convenience. Mr. Thatcher may be away over the Christmas and New Year holidays. I am sure you will hear from him shortly and think it would be a mistake to go to the trouble of having the bonds made out in the new names until the form is approved by Mr. Thatcher or ourselves.

Very truly yours,

Percy H. Clark

PHC:mac

EXHIBIT NO. 80

December 29, 1943

Mr. Richard E. Dwight
100 Broadway, New York

Dear Mr. Dwight:

I have a letter dated December 21 written by order of the Pioche stockholders' meeting signed by E. G. Woods, Secretary. This letter having been sent by registered mail was not received until the afternoon of the 27th. Mr. Woods enclosed with that letter among other things a copy of a registered mail letter dated December 18 addressed by John Janney to Thatcher and Woodburn. This letter refers to the form of 4% income bonds sent by Mr. Baker to Mr.

Thatcher but no copy of the bond or of Mr. Baker's letter of transmittal was enclosed and our Committee has not heard from Mr. Thatcher concerning these matters.

We are gratified to note both from Mr. Woods' letter of the 21st and Mr. Janney's letter of the 18th that a majority of the stockholders have voted approval of the Settlement and Merger Agreements and that adjourned meetings of the stockholders of Pioche Mines Company and Nevada Volcano Mines Company were to have been held last week. This will clear the way for the final settlement for which agenda should be prepared in advance. You are familiar with our requirements which were set forth in our letter to you of April 22, 1943, some of which have already been complied with. Mr. Thatcher has been advised as to our requirements. The agenda can be negotiated by him and Mr. Janney or we will be glad to take the matter up with you as may best suit the convenience of you and those you represent.

We have not heard from Mr. Thatcher since the receipt by him of Mr. Janney's letter of the 18th and enclosures but expect to hear shortly. I am sending a copy of this letter airmail to Mr. Woods and you will find a copy of my letter of today to him enclosed also.

Very truly yours,

Percy H. Clark

PHC:mac. Encl.

EXHIBIT NO. 81

November 27, 1943

Fidelity Philadelphia Trust Co.,
Broad and Walnut Streets,
Philadelphia, Pa.

Gentlemen:—

This is to acknowledge receipt of your letter of October 18th, and the statement therein enclosed.

This statement will be presented to the first meeting of the Board of Directors of the merged company which will be held as soon as the stockholders' meeting has adjourned, which was called to pass upon the settlement and merger agreements, which action will constitute the Board of Directors with authority to act on all such matters.

Very truly yours,

Pioche Mines Consolidated,
By E. G. Woods, Secretary.

EXHIBIT NO. 82

Fidelity-Philadelphia Trust Company
Philadelphia (9), Pennsylvania

November 30, 1943

Mr. E. G. Woods, Secretary,
Pioche Mines Consolidated,
Pioche, Nevada

Dear Sir:

Thanks for your letter of November 27, in which you acknowledge receipt of our letter of October 18 and statement for services as Trustee, which you

say will be presented to the first meeting of the Board of Directors of the merged company.

We assume you received our letter of November 22, outlining the requirement for payment of the trustee's fee contemporaneously with cancellation of debentures and authorization by our Company as Trustee to discontinue the pending litigation.

Very truly yours,

H. W. Latimer, Assistant Secretary

HWL:GL

EXHIBIT NO. 83

December 4, 1943

Fidelity Philadelphia Trust Co.,
Broad & Walnut Streets,
Philadelphia, Pa.

Gentlemen:—

This will acknowledge receipt of your letter of November 30th just received, together with your letter of November 22nd, referred to therein. These will be presented to the first meeting of the Directors of the merged company along with your statement for services contained in your letter of October 18th.

You appreciate of course that the stockholders' meeting which is now in session can take no action which would limit in any way the discretion of the Directors who must carry the responsibility of dealing with the obligations passed on to the merged company. It is certainly not my perogative as secretary of the company to trespass upon their authority

or interfere with their responsibility, especially so when it is duly considered that the terms of the settlement agreement must be observed in order not to raise any questions as to the release of any of the various parties to the settlement contract.

Very truly yours,

Pioche Mines Consolidated, Inc.,
By /s/ E. G. Woods, Secretary.

EXHIBIT NO. 84

December 21, 1943

Percy H. Clark, Chairman,
Debenture Holders' Committee,
1500 Walnut Street Bldg.,
Philadelphia, Pa.

Gentlemen:

The stockholders' meeting has received no response to its request that a representative of the debenture holders' committee appear at the stockholders' meeting, called for the purposes of the settlement and merger agreements. Two adjourned meetings have been held to give the debenture holders an opportunity to be represented for the purpose of a conference with reference to detailed matters that relate to the settlement agreement and debenture agreement, believing that it would facilitate the business involved, and also believing that the debenture holders' committee were obligated to facilitate the same.

With reference to clause VII of the settlement

agreement and particularly with reference to the following:—

> "The Debenture Holders Committee agrees to use its best efforts to obtain the consent of all of the undeposited debentures and all of the stockholders, who are deposited or undeposited debenture holders, to this plan of reorganization."

the meeting accepts statement of the debenture holders' committee signed by Percy H. Clark and Albert P. Gerhard, as binding the members of the committee to the statement made, namely;—

> "The assumption in your night letter of the second is correct."

We have therefore proceeded on this basis, that all of the debenture holders as recorded in the list received from the Fidelity Philadelphia Trust Company are obligated to the terms of the settlement agreement, having consented thereto.

While your committee has not sent us the signatures of the debenture holders, whose consent you have secured under clause VII of the contract above quoted, we accept the statements of the debenture holders' committee as a statement of responsible parties to the effect that the consents have been obtained to the settlement agreement as written, and without modification or reservation, based on which premises the stockholders' meeting has by ballot voted a majority vote in favor of the approval of the settlement and merger agreements.

A copy of the form of the 4% income bonds has

been sent to Messrs. Thatcher and Woodburn requesting their suggestions in relation thereto. In the absence of any reply from them the bonds will be prepared in accordance with same. The new securities are being prepared and will be issued as soon as received, in accordance with the provisions of the settlement agreement subject to its ratification by adjourned meeting of the Pioche Mines Company and the Nevada Volcano Mines Company, which will be held this week.

A meeting of the Board of Directors of the merged company will be called as soon as the members can be heard from advising the earliest possible date they can attend a meeting, which should be at the earliest possible date in January.

Respectfully,

/s/ E. G. Woods

Enclosures:—Tele. J. J. to Thatcher & Woodburn, Nov. 29, 1943, Tele. E. G. Woods to Thatcher & Woodburn, Dec. 10, 1943, Letter J. J. to Geo. B. Thatcher, Dec. 10, 1943, Letter J. J. to Thatcher & Woodburn, Dec. 18, 1943.

EXHIBIT NO. 85

December 31, 1943

Debenture Holders' Committee,
Percy H. Clark, Chairman,
1500 Walnut Street Bldg.,
Philadelphia, Pa.

Gentlemen:—

I am directed by the stockholders' meeting to state

that the meeting held this date had presented to it by the Secretary of the company the Certificate of the Secretary of State of the State of Nevada, certifying the merger agreement between Pioche Mines Consolidated, Inc., as the surviving corporation merging Pioche Mines Company and Nevada Volcano Mines Company into the surviving corporation and reducing authorized capital stock of the surviving corporation to 5,000,000 shs. of $1.00 par value or $5,000,000.00.

I am also directed by the meeting to bring to your attention clause VI of the settlement agreement which provides as follows:—

> "All parties hereto agree to use their best efforts to obtain such cash in exchange for preference notes with stock bonus as above provided".

I am directed to ask that you please state the amount of preference notes the debenture holders' committee, signers to the settlement contract and parties thereto, will subscribe in conformity with the above quoted provision of the settlement contract.

Very truly yours,

....., Secretary

[Endorsed]: Filed Jan. 23, 1948

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT BY PLAINTIFF, FIDELITY-PHILADELPHIA TRUST COMPANY

Now comes Fidelity-Philadelphia Trust Company, Trustee, one of the Plaintiffs in the above-entitled action, by its attorneys, Messrs. Thatcher, Woodburn and Forman and Morgan, Lewis & Bockius, and moves the Court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in Plaintiff's favor for the relief demanded in the Supplemental Complaint, on the ground that there is no genuine issue as to any material fact and that Plaintiff is entitled to a judgment as a matter of law; or, in the alternative,

2. If summary judgment is not rendered in Plaintiff's favor upon the whole case or for all the relief asked and a trial is necessary, that the Court, at the hearing on the Motion, by examining the pleadings and evidence before it and by interrogating counsel, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just.

This Motion is based upon

a. Affidavit of Miles S. Altemose, Vice-President of Fidelity-Philadelphia Trust Company,

b. Affidavit of Percy H. Clark, Chairman of Pioche Debenture Holders Committee.

THATCHER, WOODBURN & FORMAN

By /s/ WM. J. FORMAN

MORGAN, LEWIS & BOCKIUS

By /s/ J. TYSON STOGES

NOTICE OF MOTION

To: Francis T. Cornish, Attorney for Pioche Consolidated Mines Co. and John Janney; Springmeyer & Thompson, Attorneys for original Interveners; Douglas A. Busey, Attorney for Pioche Mines Co.

Please take notice that the undersigned will bring the above Motion on for hearing before this Court at Carson City, Nevada in the Courtroom in the United States Post Office Building on June 17, 1948, at 2:00 o'clock p.m.

THATCHER, WOODBURN & FORMAN

By /s/ WM. J. FORMAN

Service by copy of the foregoing Motion and Notice of Motion, with attached Affidavits in sup-

port thereof by Miles S. Altemose and Percy H. Clark, is admitted this 25th day of May, 1948.

CORNISH & CORNISH

By /s/ DOUGLAS A. BUSEY
Attorney for Pioche Consolidated Mines Co., and John Janney
SPRINGMEYER & THOMPSON
Attorneys for original Interveners
DOUGLAS A. BUSEY
Attorney for Pioche Mines Co.

[Endorsed]: Filed May 26, 1948.

[Title of District Court and Cause.]

AFFIDAVIT OF PERCY H. CLARK

To be Filed in the Above Entitled Suit with Motion for Summary Judgment.

Commonwealth of Pennsylvania,
County of Philadelphia—ss.

Percy H. Clark, being duly sworn according to law, deposes and says that all of the facts hereinafter stated in this affidavit are based on deponent's own personal knowledge and are true.

That deponent is an attorney and has been engaged in general practice of the law since admission to the bar in 1899 with offices at the present time at 1500 Walnut Street, Philadelphia, Pa.

That deponent between 1925 and 1928 invested

large sums of his personal assets in the stock of Pioche Consolidated and later in the debentures of the company and still owns the securities so purchased excepting 16,000 shares of said company's stock which he gave to his children who still own these shares and has deposited his debentures, scrip and coupons with Fidelity as depositary under the Debenture Holders Agreement. His debentures and scrip are owned by Willoughby Company, deponent's personal holding company, and the non-negotiable receipts issued by Fidelity representing these securities stand in the name of that company.

That deponent as Chairman of the Debenture Holders Committee and counsel for the Committee and Fidelity has in his possession minutes of the meetings of the Committee and also copies of letters written by the Committee and himself to Pioche Consolidated, John Janney, Fidelity and others relating to the above entitled suit together with original replies addressed to the Committee and himself; also carbon copies of the Supplemental Complaint and Answer thereto filed in the above entitled suit. Deponent has read all of said documents, is familiar with their contents and the actions of Committee in relation to the subject matter to which they relate; that, in order to present a clear statement of the facts giving rise to the issues in this litigation and culminating in the filing of the Supplemental Complaint by Fidelity on May 16, 1946, deponent summarizes in this affidavit under the heading "A" the events which transpired, and as to which deponent has personal knowledge, between the date of de-

ponent's first visit to Pioche in 1927 and the date of the consummation of the merger.

A

That he first visited Pioche in 1927 with a group of other stockholders and again in October, 1928 with John Zimmermann, R. T. Naylor and T. M. Hastings, all stockholders. It was at this meeting that the consolidation outlined in the Complaint in Article VI was agreed upon and the consummation of this reorganization was made possible by the securing of subscriptions to the debentures of the 1929 issue to the amount of $250,000 by John E. Zimmermann and deponent upon their return to Philadelphia.

That deponent was elected Vice President of Pioche Consolidated in December, 1928 with authority to represent said company in certain matters relating to its finances among others:

1. The execution of the trust agreement dated January 2, 1929 and certification and delivery of debentures issued thereunder.

2. Later relating to the execution of the trust agreement dated October 1, 1930 and the certification and delivery of debentures issued thereunder and still later relating to the signing and execution of the supplemental trust agreements dated August 31, 1932 and April 1, 1936 (Exhibits B and C and E and F to the Complaint).

That deponent personally solicited signatures to the early Debenture Holders Agreement of 1932 (attached to Exhibits B and E more particularly

referred to in Article IV A of the Complaint, third paragraph), and during the whole period down to 1938 followed up the holders of the debentures and coupons and secured deposits of debentures and scrip with results as more particularly set forth in the Complaint in paragraph IV A thereof.

That deponent drafted all of said documents as well as the scrip certificates, forms of stamp and other documents referred to in said documents.

That scrip certificates were registered and transferable and the books recording the issue and transfer of scrip were kept at first by C. A. Pearson, the chief accountant of E. W. Clark & Co., of Philadelphia and later by W. Evans Smith, one of Mr. Pearson's assistants. E. W. Clark & Co. were at that time engaged in the banking and brokerage business but now are investment bankers and brokers. Mr. Smith became Assistant Secretary of Pioche Consolidated and operated under the direct supervision of deponent. The coupons surrendered in exchange for scrip were held by E. W. Clark & Co. until surrendered to Fidelity on or about the first of June, 1942.

In January, 1938 Pioche Consolidated proposed to the stockholders a plan of reorganization which never became operative all as truly set forth in more detail in Article X of the Complaint and for reasons more particularly disclosed in letters, copies of which are hereto attached marked Exhibit 1, to wit:

Jan. 28, 1938—From Brandon Barringer, Vice President of Pennsylvania Company, the holder in

a trust capacity of debentures of Pioche Consolidated; to John Janney.

Feb. 4, 1938—From Albert P. Gerhard; to John Janney.

Mr. Barringer's difficulty related to creditors mostly stockholders who held notes of the company whose obligations were to remain outstanding. Mr. Dwight asked deponent if it would be helpful if arrangements were made for these creditors to come in under the plan on some basis similar to the debenture-holders and deponent advised him he thought this would very helpful and Mr. Dwight undertook to arrange for this. Deponent heard nothing further concerning this matter until on May 4th he received a lead penciled note from Mr. Zimmermann transmitting a letter from Mr. Dwight stating he had been trying to get scattered note-holders to make such an agreement but without success. Copies of Mr. Zimmermann's note and Mr. Dwight's letter are attached hereto marked Exhibit 2 to wit:

May 4, 1938—From John E. Zimmermann; to P. H. Clark.

May 3, 1938—From Richard E. Dwight; to John E. Zimmermann.

On May 9, 1938 the Voluntary Committee composed of John E. Zimmermann, Albert P. Gerhard and Percy H. Clark wrote to Mr. Dwight pointing out the obstacles to the consummation of the plan particularly the failure to arrange for the note-holders to come in under the plan and failure of the company to furnish important information. The

assent of the noteholders was never secured nor was the information furnished. A copy of the Committee's letter to Mr. Dwight dated May 9, 1938 is attached hereto marked Exhibit 3.

That deponent was constantly in touch with the issue of scrip in exchange for coupons and of transfers of scrip and in that way kept himself advised of the names of the owners of the outstanding debentures from many of whom he received inquiries from time to time relating to the progress of the affairs of Pioche Consolidated.

In 1938 Pioche Consolidated defaulted in the payment of certain installments of interest as set forth more particularly in Article IV A of the Complaint and as the affairs of the company seemed to be at a standstill and no one had authority to speak for the debenture-holders, a meeting was held on December 16, 1938 by a small group of debenture-holders who owned or represented a majority of the outstanding debentures. This meeting resulted in the preparation and adoption of the Debenture Holders Agreement dated as of February 1, 1939, by which the Debenture Holders Committee (Percy H. Clark, Albert P. Gerhard, Robert F. Holden and John E. Zimmermann, hereinafter referred to as the Committee) was appointed and its powers defined. Mr. Zimmermann resigned early in 1939.

That the Committee by letter dated March 22, 1939 advised Mr. Janney the written request (Exhibit H to the Complaint) and the Debenture Holders Agreement (Exhibit J to the Complaint) had been signed by more than a majority of the out-

standing debentures of both issues and had become binding and enclosed copies of these documents and asked Mr. Janney for certain information as more particularly set forth in said letter, a copy of which is attached hereto as hereinafter stated.

That on May 9, 1939 a conference was held between the members of the Committee and Messrs. Janney and Baker at which time Messrs. Janney and Baker agreed to the prompt audit of the company's books by independent auditors of national reputation and to an examination of the title of all of the properties owned by the Pioche companies excepting those held under lease from Amalgamated Mines and Smelters Company Ltd. The accounting firm of Barrow, Wade & Guthrie were agreed upon as the independent accountants to make the audit and Messrs. Hamm and Taylor of Las Vegas, the title examination. On May 29, 1939 a conference was held between the members of the Committee and Messrs. Janney and his New York counsel, Richard E. Dwight of the law firm of Dwight, Harris, Koegel and Caskey, when the matter of the title examination and the audit were discussed. On June 9th Mr. Holden wrote Mr. Janney urging the importance of expediting the audit without further delay. Nothing having been accomplished by June 29th deponent wrote Mr. Janney urging that he push the audit, title opinion and preparation of an operating plan and on August 23, 1939 deponent as Chairman telegraphed Mr. Janney with regard to the delays in preparation of the promised audit and title examination. Copies of these letters are attached hereto marked Exhibit 4 to wit:

March 22, 1939—From Committee; to John Janney.

June 9, 1939—From Robert Holden; to John Janney.

June 29, 1939—From P. H. Clark; to John Janney.

Aug. 23, 1939—Telegram from Committee; to John Janney.

It was not until October of 1939 that Mr. Janney was prepared for the accountant and Mr. Lieb of the firm of Barrow, Wade & Guthrie left for Pioche on October 5. In due course the Committee received from Mr. Lieb his report upon examination of accounts of Pioche Mines Consolidated, Inc. dated November 6, 1939 from which deponent quotes as follows:

"The accounts of the company, along with supporting papers and explanations furnished us, were found to be unsatisfactory, due to inadequate records, incomplete information, improper and inconsistent accounting practices, etc., as more fully hereinafter explained.

* * * * *

Conclusion

"From the foregoing, it will be apparent that a satisfactory examination of the accounts of Pioche Mines Consolidated, Inc., including the substantiation of the balance sheet as of August 31, 1939, and the preparation of a statement of cash receipts and disbursements from the inception of the company

would have been impracticable. It will, also be understood that the information submitted in this report is largely based upon data obtained from the minutes relative to corporate transactions and upon explanations received from Mr. John Janney and other officers of the company."

Although said report is a voluminous document a complete copy is filed herewith marked Exhibit 5 in order to disclose the unsatisfactory condition of the company's financial affairs in 1939 and the picture presented to the Committee at its meeting held as stated in the following paragraph.

On November 17, 1939 a meeting was held by the three members of the Committee and John E. Zimmermann and Messrs. Small and Lieb of Barrow, Wade & Guthrie. The matters disclosed by the accountants' report were reviewed and discussed at considerable length after which resolutions were adopted requesting Fidelity - Philadelphia Trust Company as Trustee to institute suit. Accordingly the Complaint was filed in January, 1940.

Since the filing of the suit defendants have established a record for procrastination and delay as is conclusively shown by the record in this case and the letters hereinafter referred to. The Answer to the Complaint was not filed until July 16, 1940, defendants' motion to strike substantial parts of the answer was granted on January 1, 1941 and defendants given 20 days to file an amended answer which was not filed until February 17, 1941. After this date no letters or telegrams passed between Mr. Janney or the officers of Pioche companies and de-

ponent's office until Mr. Joseph S. Clark, deponent's brother and the senior partner in deponent's firm, received a letter from Mr. Janney dated September 13, 1941 stating Pioche Consolidated had been approached by Mr. R. N. Hunt, the Salt Lake City representative of U. S. Smelting and Refining Company. Mr. Joseph S. Clark agreed to see Mr. Janney to discuss any proposition he might have to make and they met in the office of deponent's firm, 1500 Walnut Street, Philadelphia, on September 17, 1941. Later, on or about November 10th, Mr. Hunt came to Philadelphia with Mr. Janney and indicated his company would be interested to expend a substantial amount for the exploration and development, equipment, etc. of the Pioche properties with an option to buy a substantial stock interest in the Pioche companies if the exploration proved satisfactory. Negotiations continued for several months during which Mr. Joseph S. Clark from time to time conferred with Mr. Janney and Mr. Hunt. Deponent attended a number of the conferences held in Philadelphia and saw the correspondence relating to these matters. Arrangements were made through Mr. Hunt for a meeting with Mr. Rice, President of U. S. Smelting and Refining Company in his Boston office on or about November 21, 1941 to ascertain whether that company was in fact interested. Mr. Janney was urged to attend this meeting but declined to do so. Deponent attended with Mr. Joseph S. Clark and at the meeting Mr. Rice stated Smelting Company would not be interested in the purchase of an interest in the Pioche properties be-

cause of the heavy taxes involved but would be interested to explore the properties with an option to take a long-term lease if the exploration proved satisfactory. Mr. Janney and the Boston creditors shortly after the meeting approved of the negotiation of a plan based on a long-term lease. Negotiations continued until the spring of 1942 when a stalemate was reached and negotiations discontinued. The Smelting Company indicated it would be glad to reopen negotiations as soon as those interested in the Pioche properties settled their differences.

Copies of the following letters relating to these negotiations are attached hereto marked Exhibit 6, to wit:

Sept. 13, 1941—From John Janney to J. S. Clark.
Sept. 23, 1941—From John Janney to J. S. Clark.
Sept. 30, 1941—From John Janney to J. S. Clark.
Oct. 18, 1941—From R. N. Hunt to J. S. Clark.
Oct. 22, 1941—From N. W. Rice to J. S. Clark.
Nov. 24, 1941—From J. S. Clark to R. N. Hunt.
Nov. 24, 1941—From J. S. Clark to John Janney.
Dec. 3, 1941—From R. N. Hunt to J. S. Clark.
Dec. 11, 1941—From John Janney to J. S. Clark.

Deponent calls particular attention to the clauses in Mr. Hunt's letter dated December 3, 1941 to Mr. Clark and Mr. Janney's letter dated December 11, 1941 to Mr. J. S. Clark stating "the properties will be and will remain without lien or encumbrance." From this correspondence it would appear that Mr. Janney knew at this early date of this prerequisite for a long-term lease.

On June 3, 1942 the taking of depositions was started in deponent's office. Mr. Janney was present with Mr. Weiglein, defendants' attorney of record, and Mr. Lorenzen, a partner in the firm of Dwight, Harris, Koegel and Caskey, defendants' New York attorneys. Mr. Clark was also present with Mr. Kuen, a member of deponent's firm representing the Committee. After two days the attorneys for both sides advised that in their opinion the case should be settled. A memorandum to be used as a basis for the negotiation of the settlement was adopted late in the afternoon of the second day which provided the Committee should secure authority from the debenture-holders to enter into a final and binding agreement of settlement and Mr. Janney should secure similar authority from the stockholders and other creditors and a conference should be held in the office of Dwight, Harris, Koegel and Caskey in New York on a date to be arranged in which the parties should continue their negotiations until a settlement was arrived at. This memorandum was written in lead pencil and signed in the same way by Mr. Janney and his attorneys, Messrs. Lorenzen and Weglein and by Mr. Clark and Committee's attorney, Mr. Kuen. The original counterpart was left with deponent and typewritten copies were sent by him to the other interested parties. Since it records the initial step toward final settlement and constituted the foundation on which the subsequent negotiations were based, a photostatic copy is attached to this affidavit marked Exhibit 7. The Debenture Holders Committee secured

the necessary authority from the debenture-holders, but when they arrived at Mr. Dwight's office on the date agreed upon were advised Mr. Janney had not secured the necessary authority to enter into an agreement binding the other creditors and stockholders. However, he and Mr. Baker were present and an effort was made to reach an agreement. Three conferences were held and the Settlement Agreement which was drafted by Mr. Janney and his New York attorneys is the result. The first two conferences were attended by Messrs. Baker and Janney and their attorneys, Mr. Lorenzen and Mr. Weglein and all three members of the Committee. The third conference was held on July 7, 1942 to iron out ambiguities and conflicts in the draft attended by Messrs. Janney, Baker, Lorenzen and deponent who had been instructed by the Committee to insist on the insertion in the agreement of a clause providing the reorganization would be contingent upon the execution of a long-term lease. Mr. Janney positively refused to insert such a clause in the agreement stating that although he had every intention to negotiate such a lease at the first opportunity, the insertion of such a clause would make it impossible for him to secure a long-term lease on satisfactory terms. As no agreement could be reached on this point, the conference was ended and deponent returned to Philadelphia. On the morning of July 8th deponent received a letter from Mr. Lorenzen dated July 7, 1942 enclosing the Settlement Agreement in precisely the form to which everyone had agreed with the exception of the clause

relating to the long-term lease. He also enclosed an alternative set of pages 15, 16 and 17 which the Committee could substitute if it chose but unless one or the other of the two alternatives was accepted, the negotiations were to be ended. Attached hereto marked Exhibit 8 are copies of Mr. Lorenzen's letter and the other letters exchanged at this time which resulted in the execution of the Settlement Agreement in its final form, to wit:

July 7, 1942—From F. W. P. Lorenzen to P. H. Clark.

July 8, 1942—From P. H. Clark to F. W. P. Lorenzen.

July 9, 1942—From F. W. P. Lorenzen to P. H. Clark.

July 10, 1942—From P. H. Clark to F. W. P. Lorenzen.

The sequel to the letters exchanged between Mr. Lorenzen and deponent relating to the long-term lease did not occur until deponent received a letter from Mr. Dwight dated May 18, 1943 enclosing copies of two letters from Mr. Janney, one dated July 8, 1942 addressed to Dwight, Harris, Koegel and Caskey and the other dated May 15, 1943 addressed to Richard E. Dwight confirming the obligation by Mr. Janney to secure a long-term lease. Copies of these three letters are attached hereto marked Exhibit 9.

The Settlement Agreement was signed by the several parties and endorsers on the dates shown on the copy of the agreement attached to the Supplemental Complaint as Exhibit A. On September 5,

1942 deponent wrote a letter to John Janney regarding the drafting of the several documents which would be necessary for the consummation of the reorganization and received Mr. Janney's reply dated September 9, 1942 and the Committee wrote Mr. Dwight under date of September 16, 1942 relating to pushing the reorganization vigorously by preparing the necessary documents simultaneously rather than serially. Copies of these letters are attached as Exhibit 10.

The draft of the Merger Agreement was received from Mr. Janney on September 24th with his letter of transmittal dated September 23, 1942. A careful analysis of this draft disclosed the agreement did not conform to the Nevada merger statute and that if the Secretary of State of the State of Nevada should permit the filing of this agreement in this form, heavy taxes would be involved and probably the consent of the Securities and Exchange Commission would be required. Deponent called attention to these matters in letters to Messrs. Dwight and Weglein and Janney and at Mr. Janney's request redrafted certain clauses of the Merger Agreement to overcome deponent's objections. Although the clauses redrafted by deponent were accepted in substantially the form proposed other provisions of the draft originally submitted by Mr. Janney led to long conferences and negotiations and it was not until December 14, 1942 that the terms of the Merger Agreement were approved by Mr. Dwight by his letter bearing that date, and on December 29th Mr. Dwight and deponent signed their ap-

proval on two copies of said agreement, one copy being lodged with each of them. On December 14th deponent wrote a letter to Mr. Dwight pointing out that all parties wanted to push the reorganization to a speedy conclusion and asking for information on certain important matters as to which the Committee felt it should advise the holders of undeposited debentures when asking them to sign the consent to the plan. Copies of the letters exchanged at this time are attached hereto as Exhibit 11, to wit:

Sept. 23, 1942 — From John Janney to P. H. Clark.

Sept. 25, 1942—From P. H. Clark to Messrs. Dwight & Weglein; copy to John Janney.

Sept. 28, 1942—Telegram from John Janney to P. H. Clark.

Sept. 28, 1942 — From John Janney to P. H. Clark.

Oct. 2, 1942—From P. H. Clark to John Janney.

Oct. 2, 1942—From P. H. Clark to Dwight & Weglein.

Dec. 14, 1942—From R. E. Dwight to P. H. Clark.

Dec. 14, 1942—From P. H. Clark to R. E. Dwight.

Dec. 23, 1942—From R. E. Dwight to P. H. Clark.

Jan. 2, 1943—From P. H. Clark to R. E. Dwight.

Jan. 5, 1943—From R. E. Dwight to P. H. Clark.

Feb. 5, 1943—From P. H. Clark to R. E. Dwight.

Feb. 19, 1943—From John Janney to Albert P. Gerhard.

Feb. 25, 1943—From R. E. Dwight to P. H. Clark.

Feb. 26, 1943—From P. H. Clark to R. E. Dwight.

These letters led the members of the Committee to believe the reorganization would be consummated very shortly. Note particularly the statements made by Mr. Dwight concerning a balance sheet and a pro forma balance sheet.

The situation was very abruptly changed by letters attached hereto as Exhibit 12, to wit:

March 16, 1943—From R. E. Dwight to P. H. Clark enclosing two letters dated.

March 12, 1943—From John Janney to R. E. Dwight.

April 22, 1943—From Committee to R. E. Dwight with list of debenture-holders attached.

April 24, 1943—From R. E. Dwight to P. H. Clark enclosing letter dated.

April 22, 1943—From John Janney to R. E. Dwight.

April 26, 1943—From P. H. Clark to R. E. Dwight.

May 3, 1943—From P. H. Clark to R. E. Dwight.

By paragraph VIII of the Settlement Agreement the Creditors' Committee agreed to "use its best efforts to obtain the consent to this agreement of the directors of Pioche Mines Consolidated, Inc. and Pioche Mines Company, and of all of the creditors of any of the companies herein involved, exclusive of the deposited debentureholders . . ." In view of this undertaking by the Creditors' Committee and the assurances given in the letters just above quoted, the members of the Committee seem justified in their belief that defendants would produce a balance sheet and give such other information as would

assist the Committee in obtaining the consents of the holders of undeposited debentures. The Committee was fully aware of the obligation undertaken by it by Article VII of the Settlement Agreement to use its best efforts to obtain the consent of all the undeposited debentures and all of the stockholders who are deposited or undeposited debenture-holders to the plan of reorganization, but they had expected the cooperation of the members of the Creditors' Committee and particularly of John Janney as President of the Pioche companies in obtaining such consents. The realization that the Creditors' Committee and others did not propose to cooperate with the Committee brought back forcibly to their recollection the reasons why the reorganization of 1938 had not been consummated particularly the failure of John Janney and his companies to furnish important information and of other creditors to come in under the plan. They also realized the outstanding undeposited debentures were held mostly in trusts and estates and recalled the position taken by Mr. Brandon Barringer in his letter to Mr. Janney dated January 28, 1938, a copy of which is attached hereto (see Exhibit 1). They also realized that although defendants' failure to cooperate constituted a breach of paragraph VIII of the Settlement Agreement, the situation existing in 1943 was different in many particulars from that existing in 1938 and it might be possible to secure the consent of the undeposited debenture-holders without the assistance of defendants. It was with these thoughts in mind that the Committee under-

took to secure the written consents to the settlement without the assistance of defendants and so advised Mr. Dwight, as set forth in the last paragraph of Committee's letter to him dated May 3, 1943 included in Exhibit 12 to this affidavit.

Deponent in accordance with instructions received from the Committee immediately prepared a form of assent to be signed by the debenture-holders. It required many telephone calls and personal interviews to satisfy some of the estates as well as other parties who had not theretofore consented. However, deponent kept Mr. Dwight informed from time to time of assents secured and under date of June 10, 1943 notice calling stockholders' meeting to be held in Pioche on July 15, 1943 and other documents were issued. Lated in response to Mr. Dwight's letter of July 7, 1943, deponent wrote him a letter dated July 9, 1943 reporting in full the results so far attained and copy of this letter was mailed to Mr. Woods. These letters are attached to Mr. Baker's affidavit in support of motion to intervene.

Mr. John T. Thatcher was present in Pioche on July 15, 1943 with the proxies sent by the Committee which authorized him to vote 190,000 shares of stock in favor of the merger and consolidation, but the meeting was adjourned without action until July 19th awaiting the arrival of a group of stockholders from the East who planned to attend the meeting. Mr. John T. Thatcher stayed over in Pioche until the 19th, when he was joined by his father, Mr. George B. Thatcher, but they were not permitted to vote on that day. As they could stay no longer they

left proxies with Mr. Ford, an employee of Pioche Consolidated, with instructions to vote these shares in favor of the merger and consolidation but not for anything else.

It seems the stockholders and the auditor had doubts as to whether the debenture-holders who had signed the form of consent would deposit their bonds and asked for a guarantee that the bonds would be deposited. The letters attached hereto as Exhibit 13 set forth how this matter was arranged, to wit:

July 28, 1943—From P. H. Clark to E. G. Woods.

July 31, 1943—From P. H. Clark to Hartshorn & Walter.

July 31, 1943—From P. H. Clark to R. E. Dwight.

July 31, 1943—From P. H. Clark to R. E. Dwight.

Aug. 2, 1943—From P. H. Clark to R. E. Dwight.

Aug. 4, 1943—From R. E. Dwight to P. H. Clark.

Aug. 5, 1943—Telegram from E. G. Woods to Committee.

Aug. 5, 1943—Telegram from Committee to E. G. Woods.

Sept. 16, 1943—From P. H. Clark to R. E. Dwight; copy to Woods.

Sept. 23, 1943—Telegram from Committee to Pioche Consolidated.

Sept. 23, 1943—From P. H. Clark to R. E. Dwight.

Sept. 25, 1943—Telegram from P. H. Clark to Pioche Consolidated.

The letters attached to (1) this Affidavit as Exhibits 1-18; (2) Mr. Baker's affidavit in support of

motion to intervene; (3) Mr. Altemose's affidavit contra motion for deposit in court; (4) Mr. Ringe's affidavit contra motion for order directing deposit in court; (5) Mr. Janney's affidavit in support of motion for deposit in court; and (6) Mr. Woods' affidavit in support of motion for deposit in court; and the admissions in defendants' Answer to Supplemental Complaint seem sufficient to show the differences which have arisen between the Fidelity and Debenture Holders Committee on the one hand, and defendants on the other hand.

Deponent does not refer in this affidavit to other allegations in the original Complaint for the reason that the issues raised by said allegations and the answer thereto filed by defendants have been altered as a result of the execution of the Settlement Agreement of 1942 and the Merger Agreement of 1943. The material issues now involved are presented by the Supplemental Complaint and Answer thereto, both of which were filed following the execution of the Settlement Agreement and Merger Agreement.

B.

That by reason of deponent's intimate connection with the affairs of Pioche Consolidated and John Janney as above set forth and the fact that deponent is one of the members of the Debenture Holders Committee and counsel for the Committee and Fidelity, he knows of his own knowledge many of the facts bearing upon the issues in the above entitled suit more particularly the following:

I. That the facts set forth in Article I of the Supplemental Complaint are true. Defendants in I

admit they entered into the Settlement Agreement and that the said agreement was for the purpose of reorganizing, but allege that said agreement was also for the purpose of avoiding or terminating litigation and arriving at a settlement of the action of plaintiffs against defendants and also a settlement of the counter action of defendants against plaintiffs.

II. Plaintiffs in this paragraph have endeavored to state for the convenience of the court the substance of the Settlement Agreement and have attached as Exhibit "A" a true and correct copy of that agreement. Defendants have raised questions as to the meaning of certain clauses of the agreement which present questions of construction to be determined by the court. However, in 2 (j) defendants deny that the execution of the Settlement Agreement was accompanied by assurances from Mr. Janney with regard to the negotiation of a long-term lease as alleged by plaintiff in paragraph II (j). Plaintiffs' statement that the facts set forth in (j) are true is based on letters, true copies of which are attached hereto as Exhibit 9.

III. The facts set forth in Article III of the Supplemental Complaint are true. Note defendants' admissions in the first, second and third paragraphs of 3. The undisputed fact is that all of the outstanding debentures have either been deposited with Fidelity or are in the possession of defendants excepting only $1250. which defendants state cannot be located. For some reason best known to defendants they never disclosed the number of debentures

surrendered to them until the Answer to Supplemental Complaint was filed on April 19, 1947 and up to the date of filing this Affidavit they have not disclosed the amount of scrip and coupons surrendered to them nor the amount of other debts surrendered or still out.

With respect to Articles IV, V, VI, VII and VIII etc. reference is made to the affidavit of Mr. Altemose filed in the above entitled action.

IX. That Clarence Miller died on March 3, 1944 and the action as to him stands dismissed. That Edward C. Dale died on July 15, 1947.

The statement that E. Clarence Miller and Edward C. Dale signed proxies to be voted at the meeting of stockholders of Pioche Consolidated called for July 15, 1943 is true and these proxies authorized the voting of the stock represented thereby in favor of the proposed merger and consolidation which constituted the consent of Mr. Miller and Mr. Dale to the plan of reorganization in accordance with the provisions of Article VII of the Settlement Agreement. The original proxies are in the possession of Pioche Consolidated.

X. The facts set forth in X are true and deponent alleges that Fidelity and members of the Debenture Holders Committee were under no obligation to attend the stockholders' meeting or any of the directors' meetings held during the period mentioned. Robert F. Holden, one of the members of the Debenture Holders Committee, was one of the directors named in the Merger Agreement but was unable to attend directors' meetings at the time

mentioned owing to a very serious illness which resulted in his death on November 17, 1944.

XI. Defendants 11 is almost entirely composed of admissions.

XII. That the facts set forth in Article XII, paragraphs (d), (e) and (g) of the Supplemental Complaint are true.

Referring to 12 (e) of defendants' Answer to Supplemental Complaint, defendants admit the $2,000. note held by E. W. Clark & Co. has not been paid and allege they are not under obligation to pay it until after preference notes are sold. Plaintiffs recognize these notes cannot be sold until outstanding debentures and other debts and obligations are discharged, but allege it is also true that Fidelity as depositary under the Debenture Holders Agreement cannot release or discharge the debentures, coupons and scrip pledged with it or distribute the new securities deposited with it until it receives from Pioche Consolidated (a) the sums required to repay amounts advanced by the debenture-holders who signed the Debenture Holders Agreement to cover expenses, etc. and (b) the additional new securities to be distributed to the holders of Fidelity's outstanding non-negotiable receipts. Fidelity is also obligated as trustee under the trust agreements and supplemental trust agreements to see that all of the outstanding obligations of Surviving Company are canceled and discharged before or contemporaneously with the discontinuance of the suit. Its obligations in this regard depend on the proper construction of the documents mentioned which is a matter for the court.

Fidelity is entitled to compensation for the services rendered by it for its services as trustee and depositary before or contemporaneously with the discontinuance of the suit.

That the following facts relating to the $2,000. note held by E. W. Clark & Co. are true.

In 1931 when supervising the payment of interest on the outstanding debentures deponent found no deposit had been made for the payment of the interest due April 1, 1931, and learned that Mr. Janney was absent in California. Deponent thereupon telegraphed Mr. Janney suggesting how the necessary funds could be borrowed and received a reply authorizing him to make the loan. Copies of these telegrams are attached hereto marked Exhibit 14, to wit:

March 19, 1931—From P. H. Clark to John Janney.

March 20, 1931—From John Janney to P. H. Clark.

Defendants in 12 (e) of their Answer have made a very confusing and inaccurate statement relating to the issue of new securities in exchange for the debentures deposited and to be deposited. The Committee in a letter dated November 22, 1943 to Fidelity-Philadelphia Trust Company explained the manner in which the exchanges should be effected. A copy of Committee's letter was enclosed with Fidelity's letter of the same date to E. G. Woods, Secretary, with which Fidelity enclosed also its

> "Requisition for issuance of new income bonds and common stock of Pioche Mines Con-

solidated, Inc. for delivery to holders of convertible debentures dated January 2, 1929 and October 1, 1930 deposited with Fidelity-Philadelphia Trust Company under Pioche Debenture Holders Agreement dated as of February 1, 1939, upon consummation of reorganization of old company."

Committee's letter to Fidelity is attached to E. G. Woods' affidavit in support of motion for deposit in court as Exhibit W-9 and said requisition is attached to said affidavit as Exhibit W-10. Copy of Fidelity's letter to E. G. Woods is attached hereto as Exhibit 15, to wit:

Nov. 22, 1943—From Fidelity-Philadelphia Trust Company to E. G. Woods.

This letter should clarify the statements made by defendants in 12 (e).

The complicated and entangled facts heretofore stated (see letter from Morgan, Lewis & Bockius to Richard E. Dwight dated February 27, 1945, copy of which is attached to John Janney's affidavit in support of motion for deposit in court as Exhibit DM-25 and to E. G. Woods' affidavit in support of motion for deposit in court as Exhibit W-13) show why a final closing settlement is demanded by both the Debenture Holders Committee and Fidelity in accordance with the usual practice in similar cases. Mr. Janney has himself asked for contemporaneous performance in his letter to Mr. Dwight dated November 5, 1943, a copy of which was mailed to deponent by Mr. Lorenzen with his letter dated November 12, 1943 with which he also enclosed copy

of a letter dated November 8, 1943 from Pioche Consolidated to Mr. Dwight. See copies of these letters and other letters relating to the matter of contemporaneous performance particularly deponent's letter dated November 16, 1943 to Richard E. Dwight, attached hereto as Exhibit 16 to wit:

Nov. 5, 1943—From John Janney to R. E. Dwight.

Nov. 8, 1943—From Pioche Consolidated to R. E. Dwight.

Nov. 12, 1943—From F. W. P. Lorenzen to P. H. Clark.

Nov. 16, 1943—From P. H. Clark to R. E. Dwight.

Nov. 27, 1943—Telegram from Committee and stockholders to John Janney; copy to Dwight.

Nov. 30, 1943—Telegram from Committee to E. G. Woods.

Dec. 1, 1943—Telegram from Committee to E. G. Woods; copy to Lorenzen.

Dec. 14, 1943—From P. H. Clark to R. E. Dwight.

XIII (f). For the facts relating to the assurances given by John Janney relating to the long-term lease see the letters referred to in II of this affidavit and attached hereto as Exhibit 9.

Deponent never saw the form of income bond until he received it from Mr. Thatcher on January 3, 1944. Deponent first learned that such a form of bond had been prepared when on December 29, 1943 he received a copy of a letter from Mr. Janney to Thatcher & Woodburn which referred to the form of income bond which had been sent by Mr. Baker to Mr. Thatcher on some date in December, 1943. Upon receipt of the copy of Mr. Janney's letter,

deponent immediately telegraphed to Mr. Thatcher for the form of bond, which deponent received on January 3, 1944 with Mr. Thatcher's accompanying letter dated December 29, 1943. After showing the form of bond to Mr. Altemose and learning his views with regard to the Trust Indenture Act, as more particularly set forth in Mr. Altemose's affidavit, deponent on January 4, 1944 wrote to Mr. Dwight, calling his attention to the Trust Indenture Act, and copies of this letter were sent to Mr. Altemose and Mr. Thatcher. No reply was received from Mr. Dwight. Copies of the letters referred to in this paragraph are attached hereto marked Exhibit 17 to wit:

Dec. 18, 1943—From John Janney to Thatcher & Woodburn.

Dec. 29, 1943—Telegram from P. H. Clark to Thatcher & Woodburn.

Dec. 29, 1943—From G. B. Thatcher to P. H. Clark.

Jan. 4, 1944—From P. H. Clark to R. E. Dwight.

Later, after the receipt of Mr. Janney's letter to Fidelity dated April 17, 1944 attached to E. G. Woods' affidavit in support of motion for deposit in court as Exhibit W-12, and the securities enclosed therewith including income bonds, income notes and stock of Surviving Company as set forth in said letter, Mr. Altemose secured an opinion from Fidelity's general counsel relating to the Trust Indenture Act, as more particularly set forth in Mr. Altemose's affidavit filed in this case. As Mr. Altemose was not satisfied with this situation, deponent volunteered to present the matter informally to the SEC and on June 10th he and Mr. Gerhard

called on Mr. Robert McKellar of the Corporation Finance Division of SEC and briefly explained the situation to him, stating deponent was not fully advised of the facts and after some discussion Mr. McKellar told deponent to tell Fidelity to hold the bonds until additional information could be secured and deponent did as directed. This whole matter has become unimportant by reason of Mr. Cashion's opinion dated July 31, 1944, Exhibit 3 to the Answer to Supplemental Complaint.

XIV. That Committee and Fidelity have been and still are ready and willing to consummate the settlement on the terms set forth in the Settlement Agreement and contemporaneous letters at a closing settlement at which all parties perform their several remaining obligations contemporaneously. Under existing circumstances the Committee can see no other way to consummate the reorganization.

XV. That the facts set forth in Article XV are true and deponent alleges the facts requested by Hartshorn & Walter were furnished to that firm to the full extent of deponent's knowledge, as more particularly set forth in the following letters attached hereto as Exhibit 18 to wit:

Aug. 12, 1943—From Hartshorn & Walter to Committee.

Aug. 27, 1943—From Committee to Hartshorn & Walter.

Jan. 18, 1944—From Committee to Hartshorn & Walter.

XVI. Deponent denies the allegations of defendants in paragraph 16 of their answer to Supple-

mental Complaint and refers to the exhibits attached to this affidavit.

XVII. Deponent is advised, believes and therefore avers the subject matter of defendants' 17 involves questions of law for the construction of the Court and not a dispute as to any material fact.

XVIII. Market prices of lead and zinc are now at an all-time high and there should be a speedy consummation of the reorganization on the terms agreed upon in order that the properties may be put into production promptly through a long-term lease for the benefit of all parties concerned and Committee is ready and willing to cooperate in accomplishing this end.

XIX. Assuming the facts at the time referred to in Article 19 of defendants' Answer to Supplemental Complaint were as set forth, deponent has no doubt defendants could then have arranged with Fidelity and Committee to put the properties into production on equitable terms. The present high prices of lead, zinc and other metals offer a splendid opportunity to put the properties into production through a long-term lease as agreed upon. With the assistance of the Court there should now be no difficulty in reaching this end which is the express wish of all parties concerned.

XX. There has been no conspiracy between Fidelity, members of Debenture Holders Committee or other parties such as is charged by defendants in general terms and no facts have been alleged sufficient to support such charge and there has been no breach of the Settlement Agreement by Fidelity

or the Committee or any of its members. On the contrary the facts clearly show defendants have from the beginning opposed all efforts of Fidelity and the Committee to arrange for a closing settlement to terminate the controversy which has interrupted the development of the promising enterprise in which the parties to this suit are interested.

/s/ PERCY H. CLARK.

Sworn to and subscribed before me this 12th day of May, A.D. 1948.

[Seal] /s/ W. EVANS SMITH,
Notary Public.

My commission expires Jan. 24, 1949.

EXHIBIT NO. 1(A)

The Pennsylvania Company
Philadelphia, Pennsylvania

Copy January 28th, 1938

Mr. John Janney, President
Pioche Mines Consolidated.
c/o Exploration and Development
Underwriters, Inc.
551 Fifth Avenue
New York City, N. Y.

Dear Sir:

As one of the trustees of the Estate of Robert Glendinning we have received your letter of January 24th, and the enclosures. While we are anxious to cooperate in obtaining the new money we are unable to see how a trustee could agree to convert debt of a company into stock unless all creditors were willing to convert like-wise. We notice from the agreement that a very large amount of "ad-

vances from stockholders'' are to be paid partly in cash and partly to remain as debt due within five years. We feel that these stockholders should certainly be willing to accept the same terms that are asked from the company's bondholders who are not stockholders.

We also feel that the proportion of the stock given to creditors is entirely too low and that stockholders should be willing to make sacrifices in the form of turning over a large proportion of their stock to the Treasury at least equivalent to the sacrifices asked of bondholders.

Very truly yours,

/s/ Brandon Barringer, Vice President.

EXHIBIT NO. 1(B)

Copy February 4, 1938

Mr. John Janney,
Exploration & Development Underwriters,
551 Fifth Ave.
New York, N. Y.

Dear John:

I went over the Debenture Holder Committee records yesterday afternoon with Percy Clark and to date there has been deposited $354,000.

Percy informed me that Mr. Barringer of the Pennsylvania Company, Trustee for the Estate of Robert Glendinning, had raised some questions and that he was writing you direct.

I telephoned Mr. Barringer this morning, and he informed me he had had no reply from you to his letter of last week.

It seems to me it is vitally important to obtain the signed agreements of the various stockholders, who hold notes or who have made advancements to the Company, and that our Committee should be furnished with copies of same and the full list of names and amounts of such stockholders. There are some 70,000 bonds in trust estates.

Mr. Barringer is not the only one who has to date expressed an objection to these stockholders being given a priority to the debenture holders who convert their bonds into stock. Personally, I do not see how we can present any argument to these objectors, unless these stockholders are signed up and it is shown that they are taking a considerable amount of stock in adjusting their claims.

As you know, a good many of the debenture holders are away, and no answer can be expected from them for some time, but all have been communicated with.

Will you let me know as soon as possible when we can expect to get these statements?

With best regards,

Very truly yours,

/s/ Albert P. Gerhard

EXHIBIT NO. 2(A)

Z's Lead Pencil Note to P. H. C. Transmitting Dwight's Letter of May 3, 1938

Copy May 4th

Dear Percy:

Called Dwight on telephone upon return from

lunch but found him out—left word to have him call me. This morning found enclosed on my desk. This would seem to leave outstanding debt in notes to be repaid in 10 years of $65985.00—if $50,000. Baker item is considered a gift. Call me when you are ready to discuss.

JEZ

EXHIBIT NO. 2(B)

Dwight, Harris, Koegel & Caskey
100 Broadway

Copy New York, May 3, 1938

John E. Zimmerman, Esq.
U. G. I. Building
Philadelphia, Pennsylvania.

Re: Pioche Mines

Dear Mr. Zimmerman:

I am enclosing herewith revised agreements with respect to indebtedness of Messrs. Janney, Baker and Hastings. These were not forwarded to you sooner as we have been trying to get two or three of the scattering noteholders to make the same agreement but without success.

Please let me know if you have any criticisms or suggestions with respect to the form of these agreements.

Very truly yours,

/s/ Richard E. Dwight

(Z's lead pencil note): Percy—Who are the two or three scattering noteholders and how much is owed them?

EXHIBIT NO. 3

Philadelphia, Pa., May 9, 1938

Richard E. Dwight, Esq.,
100 Broadway, New York City.

My dear Mr. Dwight—

We received your letter of May 3rd with enclosures which raise questions that we are fearful are going to be troublesome in attaining the consent of debenture-holders to the Plan. We do not see what purposes are served by handling Mr. Baker's loan of $50,000 in the manner covered in his letter, and it certainly looks funny to say the least that a couple of loans of $500 each should be postponed for payment for ten years and not converted into stock when the debenture-holders are doing so for a very much greater sum of money. The same may be said of the Watres and Bogert loans.

We also believe that it is going to be extremely difficult to justify to the debenture-holders the fact that the President of the Company does not seem to be willing to take stock in payment of all the debts of the corporation to him.

There is certain information we feel we should have in our possession, not only for our own protection but also for that of the debenture-holders and the new money, to-wit:

1. Statement showing—

(a) What debts and other obligations will remain outstanding after consummation of the reorganization other than outstanding debentures and scrip.

(Such debentures as do not come in under the Plan will increase the outstanding debt.)

(b) Whether the stockholder-creditors will relinquish interest accrued to date.

(c) Whether any of the indebtedness remaining outstanding will carry interest, the interest rate and what the aggregate of such annual interest will be.

(d) Will the stockholder-creditors, to the extent that they are paid in stock at $2.50 per share, accept pool receipts?

2. Our figures indicate that since January 1, 1936 the cash receipts of Pioche Consolidated from stock sales, Hastings, Baker, et al., shipments of ore and concentrates and new money amount to over $550,000. In our search for definite figures we have noted the statement of cash receipts and disbursements from January 1 to October 31, 1936, which is printed on page 13 of the Prospectus of December 26, 1936, a copy of which you will find enclosed. We should have a similar statement brought down to as recent a date as may be, showing for what purposes this money has been disbursed and before the reorganization is finally consummated an audit of this account should be had and the auditor's certificate should be presented at the settlement.

3. If the holders of 90% of debentures agree to deposit under the Reorganization Plan and the Plan is declared operative, will any provision be made to protect the stockholders and remaining creditors from the outstanding debentures on which interest is in arrears? The Agreements under which the debentures are outstanding provide that in case of de-

fault in the payment of any instalment of interest which shall continue for a period of thirty days, the Trustee may and shall, upon the written request of the holders of 50% in aggregate principal amount of the debentures then outstanding, declare the principal of all the debentures then outstanding to be due and payable immediately. The scrip certificates provide that in the event that the debentures of either issue shall be declared due and payable by the Trustee, the scrip certificates shall likewise become due and payable on the same date as the debentures so declared due and payable. As long as a sufficient majority of debentures remain outstanding in friendly hands, it seems reasonable to suppose that the Trustee can be induced not to declare the debentures due and payable and the holders of the minority of debentures will not be able to take any hostile action other than to bring suit on their bonds. This would be expensive and it seems unlikely that any such suits would be brought but those who come in under the Plan should be given as much protection in this regard as possible. In addition, they should also have some protection against those stockholder-creditors whom your letter indicates are unwilling to sign the agreements signed by Janney, Hastings and Baker.

4. If statements are produced as above requested and we are able to secure the deposit of 90% of the debentures, what is going to be the situation with the SEC? Our attorneys, as you know, are inclined to the opinion that the proposed sale of stock for the new money cannot be put through as a private sale

in view of the fact that the stock has been publicly offered in so many places for such a long period of time. They fear that an effort to get a favorable ruling from the SEC under the present Plan will result in delay and ultimate failure. We would like to know the opinion of your Firm as to whether the Company should be able to get the approval of the SEC.

The Balance Sheet of November 30th does not disclose the amount of interest accrued to date on outstanding debentures and scrip and we understand it does not show any accrued interest to other creditors. Mr. Gerhard some years ago loaned $10,000 on Mr. Janney's personal note plus a contract obligating the Company to substitute its obligation at a later date as the money was being used for Company purposes. The Company has never substituted its obligation. Is this debt shown on the books? Are there any other obligations to pay money, issue securities or otherwise in favor of the stockholder-creditors or others which should be provided for in the reorganization? All such debts and obligations should be disclosed in the statement mentioned in paragraph 1 above. We believe it will be very helpful if we can state to debenture-holders that Mr. Janney has assured us that the Plan when consummated will make provision for all debts and obligations of the Company.

All of the members of the Debenture-holders' Committee want to see the Reorganization Plan consummated at the earliest possible date but they greatly fear, if the delays in furnishing information

as requested are continued, the debenture-holders will scatter for the summer and it will not be possible to accomplish what we all desire. It is our firm belief that a voluntary reorganization along the general lines proposed can be put through before July 1st, the date specified for the termination of the Reorganization Agreement and that, if this is not accomplished, responsibility will rest with the Pioche Company.

In this connection we want to point out that we have held off debenture-holders who have asked questions as long as is practical and that as these questions must be answered before they will give their consents, it is of the utmost importance that the information herein requested be furnished promptly.

Very truly yours,

John E. Zimmermann
Albert P. Gerhard
Percy H. Clark
Debenture-Holders' Committee

EXHIBIT NO. 4(A)

Pioche Debenture-Holders' Committee
Under Agreement Dated as of February 1, 1939.

Mr. John Janney
551 Fifth Avenue
New York, N. Y.

March 22, 1939.

Dear John—

You will find enclosed herewith copies of two documents, as follows:

1. A document requesting the Fidelity-Philadelphia Trust Company, as Trustee under the two Trust Agreements under which the Pioche debentures are outstanding, to declare the debentures due and payable immediately, and to make formal demand on the Pioche Company for payment; and

2. A document appointing a Committee to represent the debenture-holders, and defining its powers.

These documents have been signed by the holders of more than a majority of the outstanding debentures of both issues and have become binding. The original of Document No. 1 is in the possession of the Committee and will not be delivered to the Fidelity-Philadelphia Trust Company at this time. The original of Document No. 2 is about to be delivered to Fidelity-Philadelphia Trust Company.

The conferring of definite authority on a Committee, coupled with the deposit of the securities with the Fidelity, should facilitate prompt reorganization of the capital structure of the Company, which seems not only desirable, but necessary.

Mr. Zimmermann has resigned from the Debenture-holders' Committee owing to other responsibilities which make it impossible for him to give the time required. He has advised the Committee that Mr. Dwight has written him stating he has a plan to suggest for the financing of Pioche and he promised to get in touch with Mr. Zimmermann upon his return from a vacation. Zimmerman is now in Philadelphia but has not heard from Dwight. The Committee will be glad to consider Mr. Dwight's plan but suggest it be submitted in written form in

order that they may have something definite and concrete to discuss.

It will be very helpful toward arriving at a mutually satisfactory solution of the problems of the Company if you will advise the Committee of the present status of the affairs of the Company in some detail and will cooperate in other respects in working out a plan of recapitalization.

In this connection we would appreciate your sending us the following information:

1. Names of present directors and officers of the Company.
2. Most recent balance sheet.
3. List of all creditors.
4. Statement of present conditions at Pioche, including activities of our own Company and other companies operating in the neighborhood, and including particularly Amalgamated Pioche Mines and Smelting Company, Ltd.
5. Estimate of how much money is required to enable the Company to go into profitable operation.

Please designate some day next week when it will be convenient for you to meet with the Committee to discuss the matters referred to in this letter.

Letters for the Committee should be addressed to Percy H. Clark, Chairman, 1500 Walnut Street Building, Philadelphia, Pa.

Very truly yours,

Debenture-Holders' Committee

By /s/ Percy H. Clark, Chairman

EXHIBIT NO. 4(B)

Copy for Mr. Clark, Mr. Gerhard; from R. F. Holden, 1528 Walnut St.

Mr. John Janney
1810—551 Fifth Avenue
New York, N. Y.

June 9, 1939

Dear John:

I am quite disturbed to hear that you are expecting to postpone your trip to Pioche, which means, of course, a further delay in arriving at any plan of reorganization.

Frankly, the patience of the bondholders is rapidly becoming exhausted. It seems to me that it is clearly your duty, as President of the company, to go immediately to Pioche and expedite the audit, title search and other matters which we have discussed, without further delay.

If the books are in such bad shape that Mr. Woods cannot complete the work before the end of the month, I believe we should send out independent auditors immediately to get this job done, even though it costs us a little more to do it that way. The bondholders demand action and the Committee which they have chosen to represent them cannot justify further delay.

With best regards, I am

Very sincerely,

/s/ Robert F. Holden

RFH:J

EXHIBIT NO. 4(C)

Mr. John Janney June 29, 1939
Pioche, Nevada.

Dear John—

This will acknowledge receipt of your letter of June 23. The members of the Committee are glad to note that you have planned to be in Pioche not later than the 30th of June. The following matters are of first importance:

1. Mr. Lieb, of Barrow, Wade, Guthrie & Co., is ready to go to Pioche as soon as you are ready for him, and we will expect to hear that you are ready for him shortly.

2. We also hope you will promptly get us the names of two or three attorneys from whom we can select one to examine the titles and give an opinion. It will be advantageous if the title examination can proceed at the same time as the audit.

3. We understand you will take up with Mr. Hunt the matter of preparing an operating program and an estimate of the funds needed, and will send your written recommendations to us.

4. Please advise us of the present status of the Amalgamated suit. We have never seen the complaint, nor the answer, and we feel we should be advised concerning the progress of this matter.

It will greatly facilitate our negotiations if you will push the audit, title opinion and preparation of an operating plan, and keep us advised with regard to the Amalgamated suit. The Committee represents about 75% of the total outstanding indebtedness of

Pioche Consolidated. The debenture-holders who have deposited their securities with Fidelity, as well as a number who, for particular reasons, have not deposited, look to the Committee for a constructive program. The best thing you can do to protect the interests of all concerned is to cooperate with the Committee by getting together as promptly as possible the information which will make possible the formulation of such a plan.

Very truly yours,

/s/ Percy H. Clark, Chairman,

Pioche Debenture-Holders' Committee

PHC:M. CC sent to 551 Fifth Avenue, New York, N. Y.

EXHIBIT NO. 4(D)

Western Union

Day Letter August 23, 1939

John Janney
Pioche Mines Consolidated, Inc.
Pioche, Nevada.

Interminable delays in preparation for promised audit and title examination which we understood from you would be completed in June make it necessary for committee to insist that an early date not later than September tenth be fixed for visit of our auditor and attorney Stop This is necessary in order that a recapitalization plan may be formulated without further delay Stop If you still object to Thatch-

er send us promptly names of three attorneys from whom we can choose one Stop Wire answer.

Percy H. Clark, Chairman

Chg. Clark, Hebard & Spahr, 1500 Walnut Street Building.

EXHIBIT NO. 6(A)

551 Fifth Avenue, Suite 1810
New York, N. Y.

Mr. Joseph S. Clark, September 13, 1941
1500 Walnut St. Bldg.
Philadelphia, Pa.

Dear Mr. Clark—

I have a letter from our attorney in Reno, Mr. Hawkins, who writes me after conference with Mr. Thatcher, supplementing a very brief letter written about a week before.

In the second letter, Mr. Hawkins goes into some detail giving Mr. Thatcher's idea as follows: "Thatcher's idea,—and it is mine also,—that the substance of any adjustment which might be made should be worked out between and by you people in the East; that all of you are there, and within easy reach of each other * * *. His entire attitude was one of friendly concern that all people who have labored and spent their moneys should continue to have an opportunity to get their money back, or at least get a run for it." He further suggested that the matter be taken up with you.

This correspondence resulted from a proposal of

U. S. Smelting & Refining Company, whose representative in Salt Lake City paid a visit to me here in New York to discuss the possibility of something being done that would bring about quick action of the Pioche properties in view of defense requirements, and I felt that Mr. Hawkins should communicate this situation to Mr. Thatcher who has no doubt reported it to you.

If you agree with the above suggestion of Mr. Thatcher, I would be glad to have a conference with you and as the pretrial conference is set for September 24th, making my time in the East short, I would suggest that the conference be held not later than Wednesday of next week.

Very truly yours,

/s/ John Janney

EXHIBIT NO. 6(B)

Mr. Joseph Clark, September 23, 1941
1500 Walnut St. Bldg.
Philadelphia, Pa.

Dear Mr. Clark—

In response to your request, I am writing you as follows:

At the suggestion of Mr. Thatcher I came over to your office Sept. 17th. I brought with me Mr. L. C. Berry of Mr. Dwight's law firm. The purpose of the meeting was to present a letter dated August 1st which I had received from the U. S. Smelting Refining & Mining Co., which letter followed a visit to me in New York on July 10th of Mr. Hunt of that

company. You had a copy of the letter struck off for your files, and also copy of my reply to Mr. Hunt. In my reply I said: "I feel that the parties at interest in the litigation in Nevada should also share the responsibility involved in what you have proposed."

To begin at the beginning, I will outline the events which led up to this meeting:—A little over a year ago the U. S. Smelting Company expressed interest in our Pioche affairs to Mr. Milner of Salt Lake City, one of our Directors, by suggesting they might be helpful in connection with the litigation which was started by the debenture holders against the Pioche Company in the Nevada courts. At that time I did not consider that their suggestions were sufficiently definite to justify consideration at a time when we were very busy preparing to defend the suit.

There has been a recent development quite definite in its nature, as expressed in a visit by Mr. Hunt of the U. S. Smelting Company to me in New York on July 10th. In this meeting Mr. Hunt expressed quite definitely that his company would be interested in seeing an end to the litigation between this company and its debenture holders, that he felt that details could be worked out for having his company put in the money for large scale development and equipment of our Pioche company properties on some fair basis. I told Mr. Hunt I was without authority to make any proposition to him because the company was in litigation but that I would be glad to submit any matter to the stockholders which

would meet the approval of his company and the debenture holders.

I then wrote Mr. Hawkins, our attorney in Reno:

"Since this offer from the U. S. Smelting Refining & Mining Co. has come from sources apparently disconnected with the plaintiff's group, I feel that it is a matter to be considered by all interested parties, rather than by the officers and directors of the company alone. This is particularly true since the situation has in a measure been taken out of our own corporate chambers and placed before the Federal court for decision."

After conferring with Mr. Thatcher, Mr. Hawkins reported as I wrote you in my letter of September 13th.

From my correspondence with Mr. Milner I quote the following:

Milner to Janney, June 6, 1941—

"I know definitely that the U. S. Smelting people are definitely interested in your situation at Pioche and that they would go in in a large way * * * to open the way for necessary financing to put the property into substantial production on some fair basis. One of their officials suggested that I should so advise you * * * They have been keeping an eye on the progress of the suit at Carson City and read me a report on it this week."

Janney to Milner, June 19, 1941 —

"I cannot just make out from your letter the import of your reference to the U. S. Smelting people. One construction is that they really have a proposition to offer which they have worked out to put the

company into production,—which would seem especially desirable at this time as metals are in such demand for national defense and so if they have any such proposition as your letter indicates I would feel that we should give due consideration to it, but as you know I am so situated just now that I just do not have either the time or inclination to enter into any long dragged out negotiations."

Milner to Janney, June 24, 1941—

"Hunt of the U. S. Mining Smelting & Refining is in Denver and will return Thursday. He expects to leave here by plane possibly early next week for New York and Boston. He asked me if you were in New York. I said yes—He said he would appreciate my giving him a letter to you so you and he could get together and discuss the Pioche situation with view to working out something to permit production to start, while demand for lead and zinc for defense use is so acute.

"He said that his company was definitely interested in doing something about your situation at Pioche, and that he felt that a get together talk between you might develop into a solution of your problem of a mutually satisfactory nature. Hunt is very straightforward, a very fine geologist and engineer, a good business man and a gentleman. I am sure that you will both talk the same language as to the principles controlling among business associates who appreciate the value of integrity in any venture. I wish you would advise me as to your movements so I can advise Hunt where to reach you."

Telegrams exchanged—

"Richard Hunt of U. S. Mining expects to leave by plane for New York Monday evening arriving Tuesday morning and will endeavor to contact you by telephone and arrange meeting. Advise if arrangement is satisfactory. Regards." Milner

(This was in reply to Janney letter to Milner that he would be in New York the following week).

"Back in city Thursday morning glad meet Mr. Hunt then." Janney, July 3rd.

In the meeting with Mr. Hunt, it was tentatively discussed that in view of the effect of recent years of delay upon the properties and holdings of the company, it would be necessary for a development fund to be set up and based upon the expenditure of $150,000 to $250,000 in developments an option might be acquired covering a 50% interest based on the payment of an additional sum of say, $750,000. in further improvements. Neither party to the interview in any way committed himself to this or any other proposition; and the letter which Mr. Hunt wrote from Salt Lake City on August 1st, after conferring with his Boston associates, was presented to you at our meeting.

At our meeting with you it was stated by Mr. Berry that if any negotiations were to be undertaken, it would be necessary to have an extension of time for the date of the pre-trial conference set for Sept. 24th and also a like extension of time for the date of trial, as the interval of time between the two dates would have to be adequate for the taking of depositions. It was agreed that the two dates would be extended for two weeks and that other extensions might become necessary.

It was pointed out by Mr. Janney that the Pioche Mines Company had borrowed around $150,000 of emergency money and this would have to be paid back. All of this would not have to be paid back at once and it might be arranged that the Consolidated company might not be required to pay this amount to the Pioche Mines Company out of funds received from the U. S. Smelting company as this was primarily an obligation of Pioche Mines Company and the payment might be arranged in some other way,—altho there was no authority to speak on that point the matter had to be mentioned so as to avoid misunderstanding.

It was pointed out by Mr. Hebard that the debenture holders had incurred certain expenses in the litigation and if that could be provided for, it would make it easier for the debenture holders to make their arrangements.

Mr. Clark asked Mr. Janney to submit a proposition. Mr. Janney said he was not in position to make any proposition. In an effort to arrive at some tentative basis for consideration it was suggested however, that the amount of the total company loans including the debentures without interest represented a little over one million dollars; that the amount invested by stockholders represented a little over one million dollars without interest; and that the values in property and other values contributed amounted to about the same, so that if one-third of the proceeds of a deal with the Smelter company were given to the debentures, and two-thirds to stockholders and other creditors, it could be considered as a fair division.

As an alternative proposition, of course subject to the approval of stockholders, and debenture holders, it was proposed that the debenture holders and other creditors of the company should together divide a fifty percent interest in proportion to the money contributed by each, leaving for the stockholders of the company a 50% interest.

Mr. Hebard asked how would the details be worked out. Mr. Janney replied there might be a number of ways, one way would be to form a company with three (3) shares with one share to the Trustee for debenture holders, and with two shares for the company. Mr. Berry was asked by Mr. Clark to work out certain information, which is now in process of preparation.

Very truly yours,

/s/ John Janney

EXHIBIT NO. 6(C)

Pioche Mines Consolidated
Pioche, Nevada

Mr. Joseph S. Clark, September 30, 1941
1500 Walnut St. Bldg.
Philadelphia, Pa.

Dear Mr. Clark—

I am writing Mr. Hawkins this morning as per enclosed copy so that he will cooperate with Mr. Thatcher in putting into effect the results of our meeting of yesterday, and I will appreciate it if you will write to Dwight, Harris, Koegel & Caskey, 100

Broadway, your confirmation of this arrangement, so that they will have it as a part of their records.

Very truly yours,

/s/ John Janney

Enc.

EXHIBIT NO. 6(D)

551 Fifth Avenue, Suite 1810
New York, N. Y.

Clarence M. Hawkins, Esq. September 30, 1941
Auburn, California

Dear Mr. Hawkins—

I went to Philadelphia yesterday afternoon for a meeting with Mr. Joseph Clark and when nothing very definite in the way of progress was registered towards the accomplishment of an agreement, I told Mr. Clark that it would be necessary for me to leave for the West, in order to be there sufficiently in advance of the pre-trial conference, the evening of the following day, and Mr. Clark suggested that it would be better to have the pre-trial conference again postponed.

The result of this was a mutual understanding that the pre-trial conference set for October 8th would be postponed on the following basis, namely, that either party on two weeks (2) advance notice to the other party could have the pre-trial conference date set for a hearing; and it was further agreed that the trial date would be postponed so as to allow the same interval of time as originally set,

namely, six weeks between pre-trial conference hearing and trial of the case—so as to permit time for the taking of depositions.

It would, therefore, be in order for you to get in touch with Mr. Thatcher with the view of putting these arrangements into effect. I am writing this hurriedly so as to catch today's mail and will write you more fully later.

With personal regards,

Sincerely yours,

/s/ John Janney

EXHIBIT NO. 6(E)

Copy

Biltmore Hotel,
Los Angeles, California,
October 18, 1941.

Mr. J. S. Clark,
First National Bank Building,
Philadelphia, Pennsylvania

Dear Mr. Clark:

I was glad to make your acquaintance Friday by long distance telephone. It may avoid misunderstanding if I repeat here thoughts expressed in that conversation.

My company is not interested in the history nor necessarily in the present status of matters at issue between the debenture holders and others, officers and stockholders, in your various companies. Nor is my company necessarily interested in any past or present status of any Pioche company except in-

sofar as it may define an interest or ownership or ways and means from here on.

My company is interested in exploring possibilities of acquiring in toto or a major interest in the total holdings whether of companies or individuals and however at present they may be controlled.

On terms attractive from a speculative but reasonable investment basis my company would welcome an opportunity to examine and consider these properties. We would hope in the last analysis to find that they offered a good chance of developing in the course of several years production of zinc-lead or lead-zinc ores on some substantial scale.

In the light of my present information, which is meager, I consider that any important investment in the exploration of these properties must have the protection of the maximum acreage held by all companies and individuals now party to your company's affairs. Mr. Janney has indicated a wish, in fact at the time it seemed to me a proper wish, that discussions be directed first to the properties in which you all collectively are interested and that discussion of properties in which he only may be interested await the outcome of such discussions. I wish to defer to Mr. Janney's wishes, if we can agree that such an approach is desirable and more likely to succeed than any other. I realize that you are embroiled in a very complicated situation. Of it I am still too ill-informed perhaps to judge what may or may not be possible procedure.

If I could arrange matters to my own liking, I would like Mr. Janney, yourself and all on your side

of the table to put aside many matters of the past at issue between yourselves and come to an agreement, perhaps even to make a formal appraisal, of the several properties, and then with your interests as companies and individuals thus defined, I would wish your side of the table collectively to put your properties down on one side of the scales and offer us the opportunity, at least, of putting our interest, management, experience and money down on the other side of the scales. Or it might be you would like to put down a little money too. I realize that in speaking thus figuratively it seems more simple than in fact such a procedure would be. Yet it may be that to succeed we would have to come to some such action, whether the outcome would be a plan for the sale of the properties, your own company or companies remaining intact as holding units during the years necessary to complete the transaction; or whether the outcome be a new company in which your several present interests, companies and individuals, might hold shares and in which we would earn a majority interest by performance and expenditure. Usually we prefer to buy the properties in which we reinvest our funds.

The above, like my conversation with Mr. Janney and my letter of August first, are generalities only. I do not see how at this stage I can be expected to contribute more than declarations of purpose and interest.

Yours very truly,

/s/ R. N. Hunt

RNH:E

EXHIBIT NO. 6(F)

United States Smelting Refining and
Mining Company
75 Federal Street, Boston, Mass.

Mr. J. S. Clark
Clark, Hebard and Spahr
1500 Walnut Street Building
Philadelphia, Pennsylvania

October 22, 1941

Dear Mr. Clark:—

Your letter of October 15th has come to my attention after a few days' absence from the office. I have also received a copy of Mr. Hunt's letter to you of October 18th.

I understand that there are a good many legal entanglements and difficulties connected with the Pioche properties and you can naturally understand that we do not care to buy into a legal dispute. If you can work out some practical method in which the Pioche properties can be offered to us free and clear, or a controlling interest in them offered to us free and clear, we would be glad to discuss the matter with you.

I am not personally well posted on the district and would like to have Mr. Hunt present at any discussion we might have. If you feel that you can present the properties on some such basis, as stated above, I would be glad to have you let me know and we can then try to set a mutually satisfactory date for a meeting.

Yours very truly,

/s/ N. W. Rice, President

NWR:HIB. cc—Mr. R. N. Hunt

EXHIBIT NO. 6(G)

Mr. R. N. Hunt November 24, 1941
c/o United States Smelting & Refining Co.,
Newhouse Building,
Salt Lake City, Utah.

Dear Mr. Hunt:

When we were together in New York a few days ago and talking among other things of the trip to Boston that I proposed to take to keep an appointment you had made for me with Mr. Rice, I promised I would write you the result of my discussion with him.

My brother, Mr. P. H. Clark, was with me and in the course of the conversation we got into quite a discussion of the kind of an agreement that Mr. Rice would like to have with the owners of the Pioche mines. He was very fearful of the excess profits tax which might result from this association and primarily on that account he thought the only arrangement his company could make with the Pioche people would be a long term lease. I see no reason why an arrangement of that kind cannot be made, but it naturally makes necessary some change in the plans that I have been talking over with Mr. Janney. In all respects, including what I have said above, Mr. Rice entered into the discussion with a great deal of interest and both my brother and I appreciated his attitude.

Sincerely,

/s/ J. S. Clark

JSC—S

EXHIBIT NO. 6(H)

Mr. John Janney,
Suite 1810, 551 Fifth Avenue,
New York City.

November 24, 1941

Dear Mr. Janney:

I saw Mr. Rice, the President of the United States Smelting and Refining Company in his office on Friday afternoon last and had a long talk with him about the Pioche mines. The two points of particular interest were—

1. He does not want to buy the mines, but suggested a long term lease providing for payment of the usual royalties; and

2. His fear of the excess profits tax.

I will take up these points with the Debenture-Holders' Committee within a day or so. It looks to me as though we will have to change our plans somewhat, but I hope not to any material extent. The point that is bothering me more than any other is that we have got to have some money to pay our pressing expense accounts, and I am sure Mr. Rice will not give it to us.

Very truly yours,

/s/ J. S. Clark

JSC—S

EXHIBIT NO. 6(I)

United States Smelting Refining and
Mining Company
Newhouse Building, Salt Lake City, Utah

Mr. Joseph S. Clark,
Clark, Hebard & Spahr,
1500 Walnut St. Bldg.,
Philadelphia, Pa.

December 3, 1941.

Dear Mr. Clark:

Before I took occasion to thank you for your letter telling of your meeting with Mr. Rice your second letter, that of December 1st, came.

First, with respect to your conversation with Mr. Rice: There are advantages on both sides in a long-term lease which you and Mr. Rice have apparently explored together. A long-term lease, however, does not rule out a bond or option on either the properties or stock, whether or not in the years ahead it should ever be advantageous to exercise it. Though at the moment the emphasis is definitely upon a long-term lease, in the last analysis I think we may not entirely forget the matter of an option, though it may be secondary. As I indicated at the beginning of our conversations in Philadelphia, always our preference is to buy properties in which we are likely to make substantial investment. But I think a long-term lease can be drawn which would be very fair to all concerned and workable in every way.

I hope we may adhere to the procedure contemplated in Philadelphia whereby when you and Mr. Janney have between the two of you framed an

agreement which each will recommend to his principals, you the creditors, Mr. Janney the stockholders, I would like then to go to Pioche with Mr. Janney with something in the way of a proposal in hand. After obtaining my own impressions of Pioche, the properties, facilities, etc., I would wish then to sit down with you and your associates to discuss the proposed business and at that time to make the necessary modifications or any counter-proposals; or I would make my recommendations to Mr. Rice, and if he prefer, he might go on from there with yourself.

I do not see that emphasis upon a long-term lease necessarily introduces changes in plans for re-organization. If anything, I would think it somewhat freed your hand. At least under a simple lease we would not be interested in your corporate affairs at all beyond knowing that both creditors and stockholders are or within some reasonable time will be in a position to properly negotiate and ratify such a lease, and that the properties will be and will remain without lien or encumbrance.

Before too long I hope to hear from yourself and Mr. Janney that you have found a mutually satisfactory formula. It surely is to your interest more than ours that any business possible in Pioche be set up and under way and in strong hands before any reversal of the tide of trade following upon cessation of hostilities in Europe. It takes time to do things underground.

I have confidence that we will find the few days spent with yourself, brother and associates in Phila-

delphia and New York were well spent. We explored a good deal of necessary ground and should now be in a position to make rapid progress when the time come.

With kind regards to your brother and Mr. Holden,

Cordially yours,

/s/ R. N. Hunt

RNH/G. cc—Mr. N. W. Rice.

EXHIBIT NO. 6(J)

Mr. Joseph S. Clark
1500 Walnut Street Bldg.,
Philadelphia, Pennsylvania

December 11, 1941

Dear Mr. Clark:

Your two letters of December 6th and December 8th were read at the meeting yesterday. At the previous meetings your letters back to and including the letter of November 14th, were also read.

After yesterday's meeting I wired you as follows:

"Meeting accepts your suggestion committee to meet representative of Philadelphia bond holders. Group have designated them and fixed Tuesday at 10:00 A.M. as tentative date. If it suits you to have your representative come to Boston that day please advise."

This meeting had to be delayed as certain of those who were to be present at the meeting will be out of town in the meantime.

The matter of outstanding shares of the Pioche Mines Company is as I explained it to you in Phila-

delphia, and if you recall, the explanation was satisfactory. I do not think you need worry about this because I think you are confusing the position of the Trust Company. They are merely registrars of the stock, not transfer agents, and have no authority as to stock issues except as authority is given to them by the company.

A copy of Pioche Mines Company articles and by-laws were sent for your files when you became attorney and later another copy was sent from our New York office. If you cannot locate these I can have another copy made and sent you from Pioche.

Your arrangement with Mr. Rice was O.K. changing the basis of the lease to a long term lease instead of the arrangement tentatively thrashed out with Mr. Hunt and this was submitted to the meeting as a basis for the deal. The detailed terms of course will have to be thrashed out after Mr. Hunt goes to Pioche but I think you will appreciate that it will be unfortunate to have any further changes. There is an advantage in our position in putting up to the stockholders a definite proposition for them to give proxies for the approval of it.

I will quote you what Mr. Hunt wrote me under date of December 4th, which letter was also read to the meeting.

"The apparent result of Mr. Clark's meeting with Mr. Rice was to shift the emphasis still farther in the direction of a long-term lease and lessen emphasis upon any option upon the stock or properties. I do not see that this makes any difference in our general plan of procedure or in matters pertaining to re-organization of the Pioche companies.

We would still be interested in knowing that creditors and stockholders place themselves in a position to properly negotiate and ratify any contract, and that the properties themselves can be held under such a contract free of any lien or encumbrance. Beyond that we would have little interest in your corporate affairs under a straight long-term lease or under a lease and bond, the option being on the properties rather than stock.''

After the meeting I received your letter of the 9th which submits an entirely new proposition to any heretofore discussed, namely, that the smelters have an option to buy the property. This is what I told Mr. Hunt in Philadelphia we would not do although you could give an option if you wished to for your interest. I think it would be very much better not to put this proposition up to the stockholders now that they have gotten this far along in considering the other proposition. Unless you insist upon it I will not do it. I do not think we should risk the success of those negotiations by putting something before the stockholders we know they will not agree to and we have a good many hard nuts to crack as it is. Don't you agree with me about this? I'm still in the position however that I will put any proposition up to the stockholders that the Smelting Company and bondholders wish to have submitted to them. My understanding is that I am trying to work out with you a practical proposition and get the approval of all parties interested, you dealing with the bond holders, and I dealing with the stockholders and creditors.

I think the meeting we will have Tuesday presents a possibility of making a big step forward if we can get the proxies of the Boston stockholders on a definite deal which can then be submitted to the regularly called stockholders meeting and to the bondholders.

I will hope to hear from you that a representative of the bond holders will be present for the meeting here on Tuesday and if you prefer Monday or Wednesday you can wire me and I will try to make the arrangements to suit your convenience.

Very truly yours,

/s/ John Janney

JJ:K

EXHIBIT NO. 7

[Handwritten]

June 4, 1942

Office of Clark Hebard & Spahr

Present J. Janney, P. H. Clark, F. W. P. Lorenzen and Arthur A. J. Weglein, S. E. Kuen

1. A majority of the present Deb. H Committee to have authority to find a majority of the outstanding debentures. Plan to be used as a basis for negotiation shall have the following elements.

All debenture holders and other creditors to receive income bonds having a par value equal to the principal amounts owing to them respectively.

Terms of Bonds.

(a) Interest at rate of 5% non cumulative payable out of net earnings of each year as determined by the Board of Directors.

(b) Maturity date as negotiated between 20 and 40 years.

(c) Sinking fund, if any, to be left to negotiations.

2. One-half of all stock to existing stockholders pro rata—one-half to all creditors to be distributed as follows: 55% to debenture holders, 45% to other creditors.

3. Merge and/or consolidate Mines Co. Nev. Volcano Mines and Pioche Consolidated Mill Site to be included in consolidation (Janney to be a creditor to the extent of any advances or expenses in connection with Mill Site) (Office Building to be included on some basis).

4. Emergency Creditors of approximately $200,000, and reasonable reorganization expenses including expenses and attorneys fees to date in the litigation, to be paid before any interest dividend or sinking fund payments to be made.

5. Mr. Janney and any fellow negotiator to have authority to bind the non-bondholder creditors.

6. Mr. Janney and his negotiators and a majority of the deb-holders committee to have authority to bind their principals also as stockholders.

7. General releases to be executed all around.

8. Parties having the requisite authority to meet not later than June 15, 1942 in New York City.

9. Trial to be adjourned until September, 1942. Depositions to be adjourned until June 22, 1942.

/s/ Frederick W. P. Lorenzen
/s/ S. Eugene Kuen Jr.
/s/ Arthur A. J. Weglein
/s/ John Janney
/s/ Percy H. Clark

EXHIBIT NO. 8(A)

Dwight, Harris, Koegel & Caskey
100 Broadway

New York, July 7, 1942

Percy H. Clark, Esq.,
Clark, Hebard & Spahr,
1500 Walnut Street Building,
Philadelphia, Pa.

Dear Mr. Clark:

I am sending you herewith the original and four copies of the revised Pioche settlement agreement. The entire agreement is precisely in the form to which veryone agreed at the conference in my office today, with the following exception:

I am sending you an alternative set of pages numbers 15, 16 and 17. This alternative is brought about by the disagreement resulting from your suggestion that the reorganization would have to be contingent upon the execution of a lease. As to this proposition, we are offering your committee two alternatives:

1. the agreement to be executed on this score in the same condition in which I sent it to you originally,

2. the agreement to be executed with some additional sentences added to paragraph IX on page 15.

In substance, the new language provides that after the reorganization has been consummated, the debenture holders may submit a lease to the new corporation and this lease must be accepted by the new company unless, within a reasonable time, a more favorable lease is presented. This provision, it seems to me, is as fair as could possibly be expected.

The Creditors' Committee is unwilling to negotiate further. Either one version or the other of the settlement agreement must now be executed by the Debenture Holders Committee or negotiations are at an end. In the latter event, we shall expect you to resume the taking of depositions on your part not later than Monday, July 13, 1942. Under our present agreement, the depositions were adjourned to July 6, 1942, with the further understanding that there would be another adjournment either until negotiations were broken off or until an agreement with the Debenture Holders Committee was reached.

I must say that your suggestion that the reorganization would not be consummated until after a lease was entered into came as a distinct surprise to me. No mention of such a condition was made at any conference, nor was such a suggestion included in any of your correspondence addressed to the previous drafts of agreement. This is indeed a

strange situation, in view of the fact that you now make your suggestion a principal point of the agreement. If we are in fact negotiating in good faith in an effort to reach a settlement, the suggestion made in the enclosed drafts should meet with your approval. If, on the other hand, we are not in fact making an effort to settle this litigation but are simply seeking to postpone the issue, then I believe that there is no alternative but to resume the litigation at once and carry it to an ultimate conclusion, whatever that conclusion may be.

Please advise me of the disposition of the Debenture Holders Committee very soon, and if the depositions are to be resumed, please confirm my understanding that the sessions will be resumed at 11:00 o'clock in the morning of July 13, 1942, at your office. You will recall that we were in the midst of your deposition and that the witness from the Trust Company was to be recalled to answer some additional questions.

If the agreement, in one of its two forms, is executed by the Debenture Holders Committee, please execute the original and three copies and forward these four executed documents to me or Mr. Janney for execution by the Creditors' Committee and, ultimately, the other parties.

Very truly yours,

/s/ Frederick W. P. Lorenzen

Enclosures

EXHIBIT NO. 8(B)

July 8, 1942.

Mr. Frederick W. P. Lorenzen,
100 Broadway, New York, N. Y.

My dear Mr. Lorenzen:

I received your letter of the 7th instant this morning with enclosures as therein stated, and have told you over the telephone we do not think the alternate proposal you have made is practical. The lease should be negotiated by John Janney, the representative of the Pioche Companies, and not by a committee which does not represent those companies. It would be very unfortunate for us to be attempting to negotiate a lease with a prospective lessee while at the same time Janney was attempting to negotiate a lease of the same properties to some other prospective lessee. If either or both got wind of the other negotiations this might of itself terminate one or both of the negotiations.

It should be made clear to the proposed lessee that the Pioche Companies and the Committee representing the Debenture-Holders have agreed upon the terms of a merger and consolidation of the properties and that John Janney is authorized to negotiate a long-term lease of the combined properties. In this way, we can present a solid front.

We have had in mind from the time negotiations were started last September that negotiations with Smelting Company should be resumed at the earliest possible moment. We, all of us, want to take advantage of the present favorable conditions for

leasing the properties as well as to put the properties into production in aid of the War effort. It would be a great mistake, we think, to defer the renewal of negotiations with Smelting Company until the merger and reorganization have been completed. As soon as the machinery looking towards the merger and consolidation has been put into motion, John Janney should reopen negotiations with Mr. Hunt and try to get him to go to Pioche to see the properties. As long ago as last November, the royalty rates for a temporary lease were tentatively agreed upon by Mr. Janney and Mr. Hunt with the approval of our Committee after a three-day conference held in this office. Mr. Hunt has outlined in a letter to me what terms might be included in the long-term lease. This letter is available for Mr. Janney for what it is worth. The Smelting Company operates a number of properties under leases and perhaps some one of these forms will lend itself to being adapted to our purposes. The fact that such negotiations are in progress should help Mr. Janney to put through the merger and reorganization plan including the raising of the necessary new funds.

The members of the Debenture-Holders' Committee will look foolish in the event that the merger and reorganization are accomplished without a lease and the consolidated properties turn up in the hands of the old management which again proves unable to finance its requirements. However, the Committee has signed the agreement in the form originally

agreed upon yesterday with the exception of the condition with regard to the lease and you will find four counterparts enclosed herewith duly executed by the members of the Debenture-Holders' Committee, to be executed by the Creditors' Committee. When these counterparts have been executed by the latter Committee, I assume you will return one executed counterpart to me.

The Committee has executed this agreement in this form on condition that:

(a) You will write us stating that Mr. Janney has agreed with you to resume negotiations with Smelting Company at an early date, and to continue such negotiations with Smelting Company or some other similar Company financially sound and reputable, in good faith for the purpose of consummating a lease as soon after the completion of the merger and reorganization as possible and

(b) That Mr. Janney will consult with your firm as attorneys concerning legal matters involved in the lease and keep you informed from time to time of his progress in order that you may be in position to facilitate the negotiations and keep us advised.

I have left the date of the agreement blank. Should it not be dated today?

Very truly yours,

/s/ Percy H. Clark

PHC/mb—Enc.

EXHIBIT NO. 8(C)

Dwight, Harris, Koegel & Caskey
Attorneys & Counsellors at Law, 100 Broadway

Percy H. Clark, Esq., New York, July 9, 1942
Clark, Hebard & Spahr,
1500 Walnut St. Bldg., Philadelphia, Pa.

Re: Pioche Mines

Dear Mr. Clark:

This will acknowledge your letter of July 8, 1942 and the four executed copies of the Pioche settlement agreement. As I told you on the telephone, I am forwarding these copies at once to Mr. Janney, who will take them to Boston for execution by Mr. Baker. I will advise you just as soon as Mr. Baker and Mr. Janney have signed.

I have been assured by Mr. Janney that he intends, just as soon as he can, to resume negotiations with the Smelting Company for a lease, and also to see if leases can be arranged on good terms with other companies which may be interested in the properties. In this connection, Mr. Janney is interested in the letter received by the Fidelity-Philadelphia Trust Company from the American Metals Co. As I advised you on the telephone, Mr. Janney knew of the interest which the American Metals Co. had in the Pioche situation, but he is very glad to have this interest reaffirmed by the letter. I would suggest that you reply to the American Metals Company letter, as soon as Mr. Janney and Mr. Baker have signed the settlement agreement. You might

advise the company then to get in touch with Mr. Janney.

You understand, of course, that Mr. Janney must immediately work on obtaining the consent of the stockholders to the agreement. He will not have substantial time available for negotiating any new lease until this immediate problem is solved.

My understanding with Mr. Janney is in line with the condition which you set out in your letter of July 8th, and, accordingly, I am advising you that Mr. Janney has agreed with me to resume negotiations with Smelting Company at an early date and to continue such negotiations with Smelting Company, or some other company financially sound and reputable, in good faith, for the purpose of consummating a lease as soon after the completion of the merger and reorganization as possible, and that Mr. Janney will consult with my firm, as attorneys, concerning legal matters involved in the lease, and keep us informed from time to time of this progress in order that we may be in a position to facilitate the negotiations and keep you advised.

As I advised you, the only change made in your language (aside from the necessary change of pronouns) relates to the deletion of the word "similar" before the words "company financially sound". You agreed to the deletion of this word in our telephone conversation.

I hope that the reorganization can now be put through quickly and smoothly, so that something useful may be accomplished with the properties.

Very truly yours,

/s/ Frederick W. P. Lorenzen

EXHIBIT NO. 8(D)

Frederick W. P. Lorenzen, Esq. July 10,1942
100 Broadway, New York, N. Y.

My dear Mr. Lorenzen:

This will acknowledge receipt of your letter of the 9th instant which gives the Debenture-Holders' Committee the assurance which I requested in my letter of July 8th to you.

I am sending Mr. Janney a copy of the letter from Thomas G. Moore of the American Metal Company, Limited addressed to Fidelity-Philadelphia Trust Company. As soon as Mr. Janney and Mr. Baker have signed the settlement agreement and Mr. Baker has signed the first endorsement, I will advise the American Metal Company to get in touch with Mr. Janney as you suggest.

You advised me by telephone this morning that Mr. Janney wanted the language of the second line on page five changed to read as follows:

"if there be any account with it."

This will confirm my approval of this change.

I join you in the hope expressed in the last paragraph of your letter.

Very truly yours,

/s/ Percy H. Clark

PHC/mb.

EXHIBIT NO. 9(A)

Dwight, Harris, Koegel & Caskey
Attorneys & Counsellors at Law, 100 Broadway

New York, May 18, 1943

Percy H. Clark, Esq.,
Messrs. Clark, Hebard & Spahr,
1500 Walnut Street Bldg.,
Philadelphia, Pa.

Re: Pioche Mines

Dear Mr. Clark:

I duly received your two letters of May 12th and 17th. For your information, I am enclosing herewith copies of two letters received from Mr. Janney dated May 15th, which are self-explanatory.

Very truly yours,

/s/ Richard E. Dwight

Encs

EXHIBIT NO. 9(B)

Pioche Mines Consolidated, Pioche, Nevada
551 Fifth Ave., Suite 1810, N. Y.

Copy July 8, 1942

Dwight, Harris, Koegel & Caskey,
100 Broadway, New York, N. Y.

Att: Mr. Fred'k Lorenzen

Dear Mr. Lorenzen:

Referring to your 'phone conversation today relative proposed leasing arrangements: my intention is, as soon as stockholders have approved the plan (until they do all my efforts should be concentrated

on holding the necessary meetings to gain such approval), to devote my best effort to securing for our company a lease contract of greatest possible benefit to the stockholders and creditors of the company under which the proposed consolidated properties shall be developed, equipped and operated. I can make no commitments as to what terms can be secured in making such a lease, nor how long it will take to consummate same. But I intend to gain the best possible lease. To that end I propose that the company shall have the benefit of a competitive position among the prospective lesses, and suitable guarantees that the property will be adequately operated. All will be duly submitted to the company's directors, stockholders and creditors.

Very truly yours,

John Janney

EXHIBIT NO. 9(C)

Pioche Mines Consolidated, Pioche, Nevada
551 Fifth Ave., Suite 1810, New York City

Copy May 15, 1943

Mr. Richard E. Dwight,
100 Broadway, New York City.

Dear Mr. Dwight:

In reference to Mr. Percy Clark's letter to you of March 26th: As I understand it, you returned this letter to Mr. Clark to have it signed by the other members of the Committee, and this request has not yet been complied with and you have asked for the return of the letter to you for your files.

In that letter Mr. Clark speaks of re-affirming the provisions of the contract about the matter of lease, which I do not see the necessity of commenting upon nor do I see the necessity of Mr. Clark inquiring at this time about our intentions on this clause in the contract. We of course entered into the contract in good faith and expect to comply with its provisions and expect the Debenture-Holders' Committee to comply also with its provisions.

It is clearly set forth in the contract as to the intent of all parties to operate the properties under lease and this clause in the contract was subject to much negotiations which was finally terminated by Mr. Lorenzen's letter to Mr. Clark dated July 7th, 1942 and by my letter to Mr. Lorenzen on the same subject dated July 8th which I believe was reflected by him in a letter he wrote Mr. Clark on July 9th. I attach copies of these letters which I think you may forward to the Debenture-Holders' Committee so that they can refresh their recollections in this matter.

As soon as this reorganization has been formally approved by the stockholders, I intend to undertake the negotiation of a lease on the best terms obtainable for the company and so that there may be no misunderstandings as to my attitude, I intend to give the U. S. Smelting & Refining Co. full opportunity and first opportunity to satisfy the requirements of the contract, inasmuch as negotiations were initiated by them to this end in July, 1941.

Very truly yours,

John Janney

EXHIBIT NO. 10(A)

Mr. John Janney, September 5, 1942
551 Fifth Avenue, New York

Dear John:

Your letter of September 1st has been forwarded to me here and I have noted its contents. You speak of ratification by the stockholders of the board's action—will it not be necessary to hold a stockholders' meeting under the consolidation and merger sections of the Nevada Corporation law? I would think the notice of the meeting and the proxy would have to be carefully prepared as well as the minutes of the meetings of the Directors and stockholders and the Agreement of Merger or consolidation. Numerous tax and other questions are involved. Unless these papers are prepared in such a way as to protect the interests of all parties concerned, delay and perhaps opposition may result which could be avoided by careful consideration of the tax and other hurdles to be overcome. I would like to see the notice, proxy, resolutions, agreement of merger, etc., before they are finally adopted. We will be glad to cooperate with the Management in getting these papers in the very best shape. I will be in my office on the morning of the 10th prepared to give the necessary time and attention to these matters and I think both Holden and Gerhard will be available.

I congratulate you on the progress you have made to date.

Very truly yours,

Percy H. Clark

EXHIBIT NO. 10(B)

Pioche Mines Consolidated, Pioche, Nevada
551 Fifth Avenue, Suite 1810, New York

Mr. Percy H. Clark, September 9, 1942
1500 Walnut St. Bldg., Philadelphia, Pa.

Dear Percy:

Your letter from Northeast Harbor dated September 5th just reached me this morning.

The Nevada law does require a stockholders meeting under the consolidation and merger sections and Mr. Dwight is working on a rough draft of the proceedings incident to this meeting.

Mr. Weglein and I met with him in his office and spent about three hours yesterday and Mr. Dwight dictated a second draft of the Contract. You will see from this we are going as fast as we can to get to the point where we can take advantage of your offer to help us get these papers in proper shape.

As soon as we have completed a preliminary draft that seems to be satisfactory to Mr. Dwight and Mr. Weglein we will let you know. We can then get together for a conference.

You will realize that the Settlement Contract provides that the Settlement Contract shall be approved by a majority of the stockholders in person or by proxy within sixty days. It provides that 66% must approve it in person or by proxy within 90 days. This is an entirely different matter from the reorganization contract which must be approved under Nevada laws at a regular meeting of stockhold-

ers,—notices for which will be sent out as soon as they finally approved by everybody concerned.

Very truly yours,

/s/ John Janney

EXHIBIT NO. 10(C)

Mr. Richard E. Dwight, September 16, 1942
100 Broadway, New York.

My dear Mr. Dwight:

We have just held a meeting of the Debenture-Holders' Committee to take an account of stock and see what can be done to facilitate the consummation of the proposed merger and reorganization. Good progress has been made to date and we assume the second endorsement will be signed by September 21st as provided in the Agreement of Settlement, thus completing its execution. It seems highly desirable to push the program through to completion while conditions are favorable. A number of important matters remain to be accomplished including the following:

1. Merger and Reorganization—We understand you have been in conference with Messrs. Janney and Weglein and are drafting an agreement providing for the merger into Consolidated of Mines and Nevada Volcano Companies under the Nevada Statute and presumably you will, at the same time, prepare notices and proxies for stockholders' meetings, minutes of the necessary meetings of directors and stockholders, form of Income Bond and note,

Trust Agreements, etc. This will necessarily take considerable time.

2. Outstanding Creditors—The settlement agreement provides the Creditors' Committee will secure the written consent of 80% of all creditors (other than deposited debenture-holders) and 66⅔% of all stockholders of Consolidated Company. When this is accomplished, all parties are to unite in an effort to get the outstanding creditors including the undeposited debenture-holders and others, to come in under the plan. Our understanding is that our Committee is not to approach the trust companies and others in Philadelphia who have not deposited until we can present to them a definite plan which can be put through promptly if practically all creditors join.

3. Accountants — The Agreement of Settlement (see I-A(2) provides for a certificate by Mr. Woods and an independent accountant certifying to the amount of the other debts. These accountants should also prepare a balance sheet showing the set up of the Surviving Company after the merger and reorganization. Such a balance sheet will be necessary in soliciting the assent of the last 20% of the creditors. We believe it important to present the picture to these creditors in a clean-cut, business-like manner. Can we not now agree on the independent accountant and start this work going?

4. Lease—At the time the agreement of settlement was signed by the Debenture-Holders' Committee, it was understood John Janney would resume negotiations with United States Smelting

Company at an early date and that our Committee would be kept advised. Has not the time now come when negotiations can be reopened with Smelting Company or some other such Company?

Our feeling is that the time is now favorable for putting through the merger and reorganization and that the agreed plan should be pushed vigorously. All of the above mentioned matters constitute elements of the plan. Is it not possible to push all of them simultaneously rather than to take them up serially? We are afraid the latter method will mean delay and leave the security-holders cold and believe a prompt and vigorous concentrated effort offers the best opportunity for success.

By Order of the Debenture-Holders Committee.

/s/ Percy H. Clark, Chairman

P.S.—Please let us know when the second endorsement is signed.

EXHIBIT NO. 11(A)

Pioche Mines Consolidated, Pioche, Nevada
Suite 1810, 551 Fifth Avenue, New York

Copy Sept. 23, 1942

Mr. Percy H. Clark,
1500 Wilnut St. Bldg., Philadelphia, Pa.

Dear Percy:

Please find enclosed herewith a draft of the contract of consolidation, pursuant to terms of the Settlement Contract of July 8, 1942, for the consideration of yourself and other members of the Philadel-

phia Debenture-Holders Committee. It is hoped that this draft will conform to your views.

The first contract was dictated by Mr. Dwight and afterwards gone over carefully by Mr. Weglein, and this draft was revised in a meeting between Mr. Dwight and Mr. Weglein and at present incorporates the views of both Mr. Dwight and Mr. Weglein, at the final meeting. From the foregoing you can see that very careful consideration has been given to each and every detail of this agreement.

If this meets with your approval, it will be submitted to the Boston Committee for their approval, and then after it is approved by the Board of Directors of the three companies, it will be ready to be submitted to the called meeting of the stockholders of the three companies.

At that time there will be delivered a Deed to the mill site and lease to the office building in conformity with the provisions of the Settlement Agreement, both of which will be first submitted to you for your approval. Also as soon as the Contract is in approved form, we will submit for your consideration proposed resolution for the stockholders' meeting.

Notices of stockholders' meeting we wish to get out at the earliest possible date and will thank you for giving prompt consideration to enclosed. A printed copy of the Consolidation Agreement will be sent out along with notices of meeting to the stockholders, and for this reason also we wish to get the Consolidation Contract in final form at the earliest possible date.

Hoping that you will find this in proper order and satisfactory form,

Very truly yours,

/s/ John J. Janney

Enc.

EXHIBIT NO. 11(B)

Copy September 25, 1942

Richard E. Dwight, Esq.,
100 Broadway, New York.
Arthur A. J. Weglein, Esq.,
11 W. 42nd Street, New York.

Gentlemen:

I received from Mr. Janney by this morning's mail, copy of the Draft of Agreement of Consolidation which I have read, but have not yet had an opportunity to discuss with the other members of the Debenture-Holders' Committee. Two points occur to me which I would like to draw to your attention without delay, to wit:

1. Would the shares of stock issued under the Agreement as drafted be full paid shares?

2. Would not the agreement as drafted involve the payment of an original issue tax on all of the 4,257,558 shares to be issued under the plan amounting to $4,683.32?

I believe the agreement can be modified in minor particulars in such a way as to eliminate any question as to whether the stock issued under it will be full paid and to cut the tax above referred to in half, and would like to offer my suggestions for your consideration.

1. Stock full paid—The General Corporation Law of the State of Nevada contains the following:

> "Section 4. The Certificate or articles of incorporation shall set forth:" * * *
>
> 6. Whether or not capital stock, after the amount of the subscription price, or par value, has been paid in shall be subject to assessment to pay the debts of the corporation, and unless provision is made in such original certificate or articles of incorporation for assessment upon paid-up stock, no paid-up stock, and no stock issued as fully paid up, shall ever be assessable, or assessed, and the articles of incorporation shall not be amended in this particular."

also the following:

> "Section 12. Any corporation existing under any law of this state may issue stock for labor, services, or personal property, or real estate, or leases thereof; the judgment of the directors as to the value of such labor, services, property, real estate, or leases thereof, shall be conclusive as to all except the then existing stockholders and creditors, and as to the then existing stockholders and creditors it shall be conclusive in the absence of actual fraud in the transaction. Any and all shares issued for the consideration prescribed or fixed, in accordance with the provisions of this section, shall be fully paid."

and the following:

> "Section 39. Any two or more corporations,

> organized for the purpose of carrying on any kind of business, may be (a) merged into one of such constituent corporations, which is herein designated as "the surviving corporation," or (b) consolidated into a new corporation, which is herein designated as "the consolidated corporation," as follows: * * *

The agreement, as drawn, is not entirely clear as to whether it contemplates a merger into a "surviving corporation," or a consolidation into a new corporation. The first paragraph of the "Now, Therefore" clause speaks of consolidating into a single corporation and that the name of the corporation "hereby formed by this consolidation shall be," etc. Throughout the agreement reference is made to "this consolidation." If the agreement provides for a consolidation as distinguishment from a merger, then the resulting corporation will be a new corporation and I would have doubt whether the new shares issued to the creditors with income bonds and income notes as a sort of a bonus will be full paid shares. The same applies with perhaps more force to the shares to be issued as bonus with preference notes.

I feel very well satisfied that the shares of Pioche Consolidated issued in 1928 in payment for properties and to acquire shares of Pioche Mines Company are full paid shares, and I presume that the shares issued since 1928 for other corporate purposes, are also full paid shares. However, I have considerable doubt as to whether the shares now

held in the Treasury of Consolidated Company are full paid shares.

My suggestion is that the agreement be amended so as to make it clear that it is a merger of Pioche Mines Company and Nevada Volcano Mines Company into Pioche Consolidated which will be "the surviving corporation" provided for in the first clause of Section 39 of the Nevada Corporation Law.

I would then have the agreement of merger provide for the reduction of the authorized capital stock from 2,500,000 shares of the par value of $5.00 each or a total par value of $12,500,000 to 5,000,000 shares of the par value of $1.00 each or a total par value of $5,000,000 to be accomplished as follows:

(a) The cancellation of the 477,660 shares of $5.00 par stock now held in the Treasury of Pioche Consolidated. This would involve no transfer and there would be no transfer or other tax.

(b) The surrender for extinguishment by the present stockholders of 1,022,340 shares of the old $5.00 par stock, or its equivalent of 5,111,700 shares of new $1.00 par stock. This would involve no transfer tax—see C.C.H. 1942, Federal Tax Service, Volume 3, page 5637, Section 113.34, from which I quote as follows:

> "(§2817 Sec. 113.34—Sales and transfers not subject to tax—In addition to the various exemptions prescribed in section 1808 which apply to stamp taxes generally (as to which see Subpart J), and to the specific exemptions provided in Section 1802 (b) which apply only to

the stamp tax imposed under that section (as to which see section 113.35), the following are examples of transactions not subject to the tax:" * * *

"(c) The surrender of stock to the issuing corporation for extinguishment. (See section 113.33 (h)."

The transactions just stated would operate to cancel or estinguish $7,500,000 of old stock leaving $5,000,000 of new stock.

(c) The surrender by the stockholders of 404,468 shares of the old $5.00 par stock (that is the equivalent of 2,022,340 shares of $1.00 par stock) in exchange for 2,022,340 shares of $1.00 par stock. The stockholders would thus receive the same number of shares of $1.00 stock that they now hold of $5.00 stock. There would be no transfer tax on this transaction—see subparagraph (i) of Section 113.34 from which I have quoted above which reads as follows:

"(i) In a merger of corporations the surrender of stock of both the merging and continuing corporations in exchange for stock of the continuing corporation."

(d) The surrender by the stockholders of 447,043.6 of the old $5.00 par stock (the equivalent of 2,235,218 shares of new $1.00 par stock) to be reissued as follows:

1.	To the Debenture-Holders.....	1,102,287 shs.
2.	To other creditors	920,053 shs.
3.	To subscribers to preference notes.	212,878 shs.
	Total.....	2,235,218 shs.

This transaction will involve two transfer taxes, (1) the transfer from the old stockholders to the corporation and (2) the transfer from the corporation to the creditors. These taxes at the rate of five cents per $100 of par value, will involve the payment of a tax of $2,235.22—see C.C.H. 1942, Federal Tax Service, Volume 3, page 5637, Section 113.33, from which I quote as follows:

> "(h) Transfer to a corporation of its own stock."

(e) The surrender by the stockholders of 148,488.4 shares of the old $5.00 par stock (the equivalent of 742,442 shares of new $1.00 par stock) to be used for Treasury purposes. This transaction will involve one transfer tax of $371.22 and total transfer taxes of $2,606.44 as against the $4,683.32 of original issue taxes involved in the event that the reorganization takes the form of a consolidation into a new corporation.

I think the above transactions involve the surrender by the stockholders of all of the old shares.

The above is based on the Transfer Tax Act as it stands on the books today. As far as I am advised, the new bill now under consideration will not amend the transfer tax provisions of the law.

I believe the adoption of the suggestion I have made above has another advantage. We, of course, do not want to ask for the approval of the S.E.C. Section 3 (a) of the Act relates to exempted securities and provides that the Act shall not apply to certain classes of securities including:

"(9) Any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange;"

If a new corporation is created as a result of a consolidation, will the securities to be issued by this new corporation be exchanged by it with its existing security holders? Will it not be better to have a merger into Pioche Consolidated and let it issue the new securities to its existing security holders exclusively?

There seems no doubt the holders of the outstanding stock, debentures and other obligations of Pioche Consolidated are existing security holders of that Company, and I would think the holders of obligations of Pioche Mines Company could be brought within this classification, but note the use of the word "exclusively" in subparagraph (9) above quoted. The preference notes to be sold for cash will not be exchanged by Pioche Consolidated with its existing security holders, but in so far as this part of the transaction is concerned, it can take the form of a sale by the surviving corporation after the consummation of the merger and without a public offering. In this connection, see Section 4 of the Security Act entitled "Exempted Transactions", from which I quote:

"Section 4. The provisions of Section 5 shall not apply to any of the following transactions.

(1) * * * transactions by the issuer not involving any public offering."

The S.E.C. has shown an inclination to extend its jurisdiction and I think we should recognize the existing situation and face it squarely.

Do you concur with the views I have expressed above?

I will write you further when I have had a chance to discuss the other provisions of the Agreement of Consolidation with the other members of the Debenture-Holders' Committee.

Very truly yours,

/s/ Percy H. Clark

PHC/mb.

EXHIBIT NO. 11(C)

[Western Union Telegram]

M82N EB 33 Copy

FI New York NY 1 14 pm Sept 28 42

Percy Clark, 1500 Walnut St. Bldg., Philadelphia, Pa.

To save time please send me promptly as possible clauses you would change redrafted as you would have them so I can submit your proposals to Messrs. Dwight & Weglein in that form.

2 10 pm. John Janney

EXHIBI TNO. 11(D)

Pioche Mines Consolidated, Pioche, Nevada
551 Fifth Avenue, Suit 1810, New York

Copy September 28, 1942

Mr. Percy H. Clark,
1500 Walnut St. Bldg., Philadelphia, Pa.

Dear Percy:

In reply to your letter of September 25th received this morning, please draft the clauses as you would change them and send them to me as promptly as you can, so that I can submit your proposals in that form to Messrs. Dwight and Weglein.

I am hastening to send you this request before conferring with them as I can see that delay can be avoided by giving consideration to your proposals in the form above suggested. I am therefore wiring you as follows:

"To save time please send me promptly as possible clauses you would change redrafted as you would have them so I can submit your proposals to Messrs. Dwight & Weglein in that form."

I agree with you that the two companies should be merged into the Pioche Mines Consolidated, and I am sure that Messrs. Dwight and Weglein both consider that the papers as drawn accomplish this and preserve the identity of the Pioche Mines Consolidated under the Nevada statute for merger and consolidation of corporations.

Very truly yours,

/s/ John Janney

EXHIBIT NO. 11(E)

Copy October 2, 1942

Mr. John Janney,
551 Fifth Avenue, New York.

Dear John:

In response to your letter and telegram of September 28th, I am enclosing herewith clauses of the Agreement of Merger redrafted to comply with the suggestions made in my letter of September 25th to you. It has taken me somewhat longer to do this than I expected because I wanted to study the applicable language of the Nevada Corporation Law more carefully than I had theretofore done in order to bring the language of the redrafted clauses into accord with the language of the statute. In this connection, please note the following quotations from Fletcher's Cyclopedia of the Law of Private Corporations, Chapter 61, relating to combination, consolidation and merger, Volume 15, page 63:

"§7068.—Form, contents and sufficiency. The merger or consolidation agreement must satisfy the requirements of the governing statute as to form and contents. It should be in writing, if the statute so requires, be signed as required by statute, state whatever is made necessary by the statutes, and contain no provisions in contravention of law. The terms and conditions of the merger or consolidation should be set out, if the statute so provides, as also the number and residences of the new directors, but the agreement need not set forth the corporate purposes of either company, for the new company, has

the same corporate purposes as were contained in the articles of incorporation of the constituent companies. Agreements of this character are very often comprehensive and specific and deal with many details of the merger or consolidation."

"§7076.—Terms and intent of statute as controlling. The matter of consolidation or merger, being under the control of the legislature, the terms and language of the statute under which a combination of corporations takes place must be given effect in determining which of the results mentioned in the preceding section follows."

"§7082.—Merger of one company into another. The statutes authorizing a combination do not necessarily operate to create a new corporation. Whether a combination has this effect in any particular case depends upon the intention as set forth in the statutes."

"§7093.—Stock and subscription to stock. The stock to be issued by the new or purchasing company to the stockholders of the constituent or selling company is generally limited by law to the value of the assets acquired, 94 and should be divided among such stockholders in proportion to their holdings, after excluding stock of the old company not issued for value, except where such stock is in the hands of a bona fide purchaser for value."

Also note to the quotation as follows:

"94.—Stock of the consolidated company should not be issued share for share of an old company, but only to the extent that the value of the assets of the old company equals the par value of the stock

issued. Taylor vs. Citizens' Oil Co., 182 Ky. 350, 206 S.W. 644."

I assume you have the language of the Nevada General Corporation Law before you and in the interest of brevity, will refer to the clauses by section and paragraph without attempting to quote them in full. In order to make myself clear I will undertake to state the reasons for each of the clauses included in my redraft as follows:

You will note that the first clause of Section 39 authorizes either a merger or a consolidation, and in the event of a merger, designates the constituent corporation into which the others are merged as the "Surviving Corporation." Referring to the first paragraph of the redrafted clauses, in order to make perfectly definite that a merger is intended, I have designated the document as "Agreement of Merger."

Paragraph (1) of Section 39, states that the directors, or a majority of them, of each of such corporations as desire to merge or consolidate, may enter into the agreement signed by them and under the corporate seals of the respective corporations prescribing the terms and conditions of merger or consolidation, etc. It seems that the agreement is to be made between the directors under the corporate seal and not between the corporations as such.

However, paragraph (2) of Section 39 provides that if a majority of the stockholders of each of the constituent corporations shall be for the adoption of the agreement, that fact shall be set forth in a certificate attached to the agreement by the Secre-

tary or Assistant Secretary of each of the corporations, and that the agreement so adopted and certified shall be signed and acknowledged by the President or Vice-President and Secretary or Assistant Secretary of each constituent corporation under the corporate seal. This makes it reasonably clear that the President is not expected to sign until after the stockholders have approved. You will note that the language of the first clause follows the language of Section 39 (1).

I have omitted your first Whereas clause, but its substance is incorporated in my caption.

Your second, third and fourth Whereas clauses are incorporated as my first, second and third recitals. You will note I have corrected the number of outstanding shares of Surviving Corporation to conform to the figure which appears in your draft in paragraph a, page 3, which I think is correct. I note you have included in this figure (2,022,340) the shares which are to be issued in exchange for the outstanding minority shares of Mines Company and Nevada Volcano Company.

The Fourth recital at the foot of page 1 is intended to be in accord with the language of Section 39 (1), first paragraph and 39 (2).

The following recital at the top of page 2 is intended to conform with the language of the first clause of the long paragraph at the end of Section 7. Section 7 has to do with the amendment of the articles of incorporation. You will note that the second paragraph of Section 39 (1) provides that if the agreement be for a merger, it shall state any

matters with respect to which the certificate or articles of incorporation of the Surviving Corporation are to be amended. You will note that Article Fourth of the redrafted clauses relates to amendments.

The last Whereas clause recites the number of shares of Mines Company and Nevada Volcano Company which are owned by Surviving Corporation. Since you have stated in the second and third Whereas clauses the number of shares of these two corporations which are issued and outstanding, it seems desirable to state how many of them are owned by Consolidated in order to make clear why only 144,119 shares of the new $1.00 par stock are to be issued to the stockholders of these two corporations.

The redrafted Now, Therefore clause follows the corresponding clauses in your draft very closely, but I have undertaken to make it clear that a merger is contemplated and have avoided the use of the words "consolidate" or "consolidation" and would like to eliminate these words wherever they appear in the agreement.

Article First of the redraft gives the name of the Surviving Corporation. This does not seem to be necessary as the old corporation is to continue as the result of the merger and no amendment of the original articles of incorporation is contemplated. However, I see no objection. Paragraph 2 of your draft seems to amend and somewhat narrow Article Tenth of the original articles of incorporation. I am not sure that my redraft is correct or that it is ne-

cessary to insert any provision concerning the number of directors. Do not the Articles and By-Laws now provide seven directors?

Article Third is the same as in your draft. Bob Holden does not know whether he should accept this position and has not given a final answer, one way or the other.

Article Fourth is intended to conform with the second paragraph of Section 39 (1). If it is intended to amend the old articles of incorporation in any other particulars, such amendments would be inserted at this point in separate lettered paragraphs.

Article Fifth is intended to show that the 5,000,000 shares, par $1.00 including the 742,442 shares to be left in the Treasury for corporate purposes are all to be full paid shares and not liable to any further assessment within the meaning of Section 4 (6) and Section 12. I have omitted the language which appeared in Article Seven of your draft because there is to be no original issue of stock under the merger. The intention is to reclassify the old full paid shares as contemplated by Section 7 (3). Even if there was an original issue of shares as the result of the consolidation, we could not make these shares full paid by a statement such as is included in Article Seven of the draft. Note the language of Fletcher's paragraph 7093 and note 94 quoted at the beginning of this letter.

I have endeavored to incorporate in my Article Sixth the substance of your Article Ninth without changing the meaning of your Article, except, as

necessary, to accentuate that the transaction is a merger involving a reduction of the capital stock by reclassification and charter amendment. You will note that I have omitted the percentages which, I think, only make the language more involved.

The number of shares to be issued under each of the different subdivisions are the same as those provided in your draft and constitute the percentages provided for in the Agreement of Settlement.

I hope the enclosed redrafted clauses referred to in this letter will be clear and you will be able to discuss with Messrs. Dwight and Weglein the suggestions I made in my letter of September 25th. I do not think I quite understand what is intended by Article ten of your draft of Merger Agreement. Do you intend to fill in the blank in the third line of ten and the blanks in the first line of 10-1 and 10-2 before you send the agreement out to the stockholders? Have you reached agreements of settlement with Kansas City Structural Steel, District National Bank, Philadelphia National Bank, Bogert, Grubbs, Hunt, Wood, et al and what percentage of written consents has the Creditors' Committee secured pursuant to paragraph XV on page 16 of the Agreement of Settlement? Do you propose to approach the holders of undeposited debentures and other creditors in writing to come in under the plan before it is sent out and do you propose to send out a letter of transmittal with the notice, proxy and Agreement of Merger?

I suggest that as soon as Mr. Dwight returns and you have had a chance to confer with him and Mr.

Wiglein concerning the matters referred to in this letter, that we all get together and lay out a program of action in order that we can conclude this reorganization as expeditiously as possible. We believe the present is a favorable time to put through our reorganization and get our properties into operation. No more favorable time for the negotiation of a lease is likely to develop and if the War should terminate, it might be very difficult to find another opportunity when we can get our properties into production.

I am leaving for Michigan on Sunday night rather unexpectedly, but will be back on Thursday of next week. I understand Mr. Dwight is expected back on Tuesday, so that my absence should not cause any delay.

Very truly yours,

/s/ Percy H. Clark

PHC/mb.—Enc. 1.

EXHIBIT NO. 11(F)

Copy October 2, 1942

Richard E. Swight, Esq.,
100 Broadway, New York
Arthur A. J. Weglein, Esq.,
11 W. 42nd Street, New York.

Gentlemen—

After Mr. Janney received my letter of September 25th, a copy of which I sent you, he asked me to send him the clauses I wanted to change, redrafted

as I would like to have them carry out the suggestions in my letter.

You will find enclosed herewith copy of the redrafted clauses and of my letter with which I forwarded them to Mr. Janney today.

Very truly yours,

/s/ Percy H. Clark

PHC/mb. Enc.

EXHIBIT NO. 11(G)

Dwight, Harris, Koegel & Caskey
Attorneys & Counsellors at Law
100 Broadway, New York

Copy December 14, 1942

Percy H. Clark, Esq.,
Messrs. Clark, Hebard & Spahr,
1500 Walnut St. Building,
Philadelphia, Pa.

Re: Pioche Mines Consolidated, Inc.

Dear Mr. Clark:

Your letter of December 9th and enclosures were duly received.

With respect to the indebtedness due to Albert Gerhard from the above Company, I think that the Directors should take the advice of the auditor and accountant as to whether the same should be included among the debentures or added to the general creditors. Of course if the decision is that the

indebtedness should be added to the debentures, the figure of $602,050 will be increased to $612,050.

Your suggested changes with respect to Seventh-1-(a) and (b), i.e., striking out the words "and the scrip appertaining thereto" in (a) and adding to (b) at the commencement thereof the words "the principal amount of" is entirely agreeable to us, and I have initialled the changes accordingly. I am also initialling the change of figures in sub-paragraph B-5 in Paragraph Sixth.

With reference to striking out the words "in such year" at the top of page 7, I agree with you that these words are perhaps superfluous. With these words eliminated, it provides the payment of interest is to be made in each year only if earned and is to be non-cumulative; in other words, interest unpaid out of earnings in any year is not to be carried over and there is no obligation to pay the same out of earnings in any subsequent years. With this understanding, I am striking out the words above quoted and suggest that you do the same on your copy.

At the bottom of page 7 you did not initial the striking out of the words "provided in said Settlement Agreement". I have done so on the copy you sent me and suggest you do the same on your copy.

With these changes, the Merger Agreement is being forwarded for approval by the Directors.

Very truly yours,

/s/ Richard E. Dwight

EXHIBIT NO. 11(H)

Copy December 14, 1942

Richard E. Dwight, Esq.,
100 Broadway, New York.

My dear Mr. Dwight—

All parties want to push the Pioche reorganization to a speedy conclusion. When the directors have approved the Agreement of Merger, the Companies will be calling meetings of the stockholders. Our Committee would like to see the form of notice and other literature to be sent to the stockholders of the Consolidated Company before it is sent out. To the best of our knowledge, all of the Philadelphia creditors are also stockholders and when they receive this literature many of them, without doubt, will call on the members of our Committee for information and advice. The members of the Debenture-Holders' Committee as trustees, will have to give the depositing debenture holders whom they represent, their reasons for advocating the plan and the trustee-holders of undeposited bonds will undoubtedly require information concerning facts which they deem material before they will exercise their own discretion. As we have heretofore stated, a balance sheet showing the new set-up seems to us almost essential. If your clients will cooperate with us in these matters, we hope to get in the overwhelming majority of the outstanding debentures. Failure to present the picture fully, concisely and clearly with

the notice we fear, may result in further unnecessary delay which might result in the loss of the present opportunity to put the Pioche properties into production. I cannot emphasize this too strongly.

Very truly yours,

Percy H. Clark.

PHC/mb.

EXHIBIT NO. 11(I)

Dwight, Harris, Koegel & Caskey
Attorneys & Counsellors at Law, 100 Broadway
Cable Address "Yorklaw"

New York, December 23, 1942.

Percy H. Clark, Esq.,
Clark, Hebard & Spahr, Esqs.,
1500 Walnut St. Building,
Philadelphia, Pa.

Re: Pioche Mines, Consolidated

Dear Mr. Clark:

Your letters of November 28th and December 14th were both duly received.

The audited figures will of course show all outstanding debts, including both debentures and general creditors. It should be a simple matter for Mr. Woods to make up a balance sheet from his audit, a copy of which will of course be furnished you.

I am disturbed, however, by your suggestion that there will be any difficulty in getting the balance of the debenture holders, or substantially all of them,

to enter into the reorganization. Remembering the experience we had when I was one of those instrumental in securing pledges for money for the plan of reorganization which failed, I think, if you have the slightest doubt in the matter, that the Board of Directors should approve the Merger Agreement on condition that not less than 80% of the remaining debenture holders who have not already filed their bonds with the Committee should do so.

This would necessitate the postponement of the calling of the Stockholders' Meeting until a sufficient number of debenture holders have deposited their bonds.

Very truly yours,

/s/ Richard E. Dwight

EXHIBIT NO. 11(J)

Richard E. Dwight, Esq., January 2, 1943
100 Broadway, New York.

Mr dear Mr. Dwight—

Before we can ask the Debenture-Holders to accept any plan of reorganization, we must be able to tell them exactly what the plan is and what the financial condition of the Company will be.

The Auditors' certificate and balance sheet should give us this information which is not yet available.

Mr. Janney is responsible for providing this information and as soon as we receive it, we believe we shall be able to get most of the Philadelphia holders of undeposited debentures to agree to the plan, provided the other creditors will also agree.

We will, of course, expect Mr. Janney to help secure the assents of outstanding non-Philadelphia debenture-holders and we will help with the other creditors who are Philadelphians known to us.

Very truly yours,

/s/ Percy H. Clark

PHC/mb.

EXHIBIT NO. 11(K)

Dwight, Harris, Koegel & Caskey
Attorneys & Counsellors at Law, 100 Broadway

New York, January 5, 1943

Percy H. Clark, Esq.,
Messrs. Clark, Hebard & Spahr,
1500 Walnut St. Building,
Philadelphia, Pa.

Re: Pioche Mines

Dear Mr. Clark:

Your letter of January 2, 1943 was duly received, and I have forwarded a copy of the same to Mr. Janney.

The auditor's certificate and balance sheet should be available very shortly.

Very truly yours,

/s/ Richard E. Dwight

EXHIBIT NO. 11(L)

February 5, 1943

Richard E. Dwight, Esq.
100 Broadway, New York

Dear Mr. Dwight—

We cannot understand why the Pioche Companies do not proceed promptly to carry out the Reorganization and Merger as agreed upon. The War demand has resulted in an opportunity to reestablish the Pioche enterprise which should not be lost. The delays of the past are most regrettable. Now that the terms of settlement and merger have been agreed to, the time for action has come. Continued procrastination and delay on the part of the management we consider inexcusable.

Seven months have passed since our Committee signed the Agreement of Settlement in response to the ultimatum served on us by your partner, Mr. Lorenzen's letter of July 7th. Note the assurances given us by him in his letter of July 9th. Now a month has elapsed since your letter of January 5th. Unless the Pioche Companies start merger proceedings promptly and push the reorganization to completion within a month, we will be forced to the conclusion that John Janney and his Companies are unwilling to fulfil the obligations assumed by them by the Agreement of Settlement.

Very truly yours,

/s/ Percy H. Clark
Chairman, Debenture Holders' Committee

PHC/mb.

EXHIBIT NO. 11(M)

Pioche Mines Consolidated, Pioche, Nevada
551 Fifth Avenue, Suite 1810, New York

(Copy) February 19, 1943.

Mr. Albert P. Gerhard,
1930 Land Title Bldg.,
Philadelphia, Pa.

Dear Albert—

This is to acknowledge receipt of your letter of February 16th. The certification of the debts of the company by the independent accountant has been ready for some time but the Directors feel that the Merger Agreement should have the approval of all the signers to the Settlement Agreement, including the Boston Committee of Stockholders and Creditors which has been delayed by several adjourned meetings.

Very truly yours,

John Janney.

EXHIBIT NO. 11(N)

Dwight, Harris, Koegel & Caskey
Attorneys & Counsellors at Law, 100 Broadway

New York, February 25, 1943.

Percy H. Clark, Esq.
Messrs. Clark, Hebard & Spahr,
1500 Walnut Street Building,
Philadelphia, Pa.

Re: Pioche Mines Consolidated

Dear Mr. Clark:

Please pardon my delay in acknowledging your

letter of February 5th. I have been very much tied up with other matters.

Everything has been done which should have been done, and we are only waiting to get back certified copies of the resolutions of the Board of Directors relative to calling a meeting of stockholders.

Very truly yours,

/s/ Richard E. Dwight

EXHIBIT NO. 11(O)

February 26, 1943

Richard E. Dwight, Esq.,
100 Broadway, New York.

My dear Mr. Dwight—

This will acknowledge receipt of your letter of the 25th.

In view of present favorable market conditions, the ending of the Pioche winter, etc., it would seem highly desirable to push the reorganization to completion promptly. A full and prompt disclosure of all material facts by the Pioche management to all Pioche security-holders alike is called for. No progress can be made without such a disclosure. To allow present favorable conditions to expire without action would, in our opinion, be inexcusable.

Very truly yours,

/s/ Percy H. Clark

PHC/mb.

EXHIBIT NO. 12(A)

Dwight, Harris, Koegel & Caskey
Attorneys & Counsellors at Law, 100 Broadway
Cable Address "Yorklaw"

New York, March 16, 1943.

Percy H. Clark, Esq.,
1500 Walnut Street Building,
Philadelphia, Pa.

Re: Pioche Mines

Dear Mr. Clark:

I am enclosing herewith copies of two letters written me under date of March 12, 1943, which are self-explanatory. I am also sending you herewith the enclosures contained in said letters, namely, audit of Pioche Mines Consolidated, Inc., and certificate of Dewey O. Simon, public accountant and auditor of Nevada, as provided for in the settlement agreement, and minutes of meeting of Pioche.

You will note that in the certified copy of the resolutions of the Board of Directors of Pioche Mines Consolidated, Inc. and Pioche Mines Company, the stockholders meetings are not to be called until 80% of the non-assenting debenture holders have approved the settlement agreement. You will note from Mr. Janney's letter that he has secured the consent to the merger of all the bondholders assigned to him with the exception of one $500 bondholder, one Mary Tancred.

In order to comply with the condition precedent to the calling of the meeting of the stockholders, it will be necessary for the bondholders' committee

to secure either consents in writing or deposit of debentures of a sufficient additional number of debenture holders to make up the required 80%.

As you probably know, there was some delay in obtaining the approval of the Boston group of stockholders, which is the principal reason these papers were not forwarded to you before.

Very truly yours,

/s/ Richard E. Dwight

Encs-4

EXHIBIT NO. 12(B)

Pioche Mines Consolidated
Pioche, Nevada
551 Fifth Avenue, Suite 1810, New York City

Mr. Richard E. Dwight, March 12, 1943
100 Broadway
New York, N. Y.

Dear Dick—

On receipt of the Merger Agreement from you which was approved as to form and returned to you by Mr. Percy H. Clark on December 29th, I immediately forwarded the same to the Boston group of stockholders and creditors for their approval.

After receipt of the resolutions of the Boston committee approving the Merger Agreement as to form the same was forwarded to Pioche for action of the Board of Directors and I enclose herewith certified copies of resolutions of both the Pioche Mines Company and Pioche Mines Consoli-

dated, duly certified to by the Secretary and under the seal of said companies.

As you know some time ago we received the certificate of an independent public accountant certifying to the amount of "principal only" of all liabilities, other than debentures of both the Pioche Mines Company and Pioche Mines Consolidated. I also enclose this certificate.

The certificate as to the debentures outstanding should of course come from the Trustee under the debenture agreement who was responsible for the issuance of debentures. The amount of debentures issued and outstanding as shown by the books of the company, based upon reports from the Trustee, is $602,050, but the books of the company at Pioche are not the original records of the debenture issues, which original records are kept by the Fidelity Philadelphia Trust Company.

Yours very truly,

/s/ John Janney

Enc.

EXHIBIT NO. 12(C)

Pioche Mines Consolidated
Pioche, Nevada
551 Fifth Avenue, Suite 1810, New York City

Mr. Richard E. Dwight, March 12, 1943
100 Broadway,
New York, N. Y.

Dear Dick—

Certified copies of resolutions of the Board of Di-

rectors of Pioche Mines Consolidated, Inc., approving the Settlement Agreement, are enclosed. You will note that in accordance with your recommendations stockholders' meeting is directed to be called as soon as the holders of not less than eighty (80%) percent of the non-assenting debenture-holders have approved the Settlement Agreement.

It is provided in Settlement Agreement that we are to secure the consent of certain debenture holders. We have secured the consent of the following:

Henry C. Brooks	$ 2,500
Gilbert R. Payson (Est. of Chas. E)	500
Lawrence R. Lee	10,000
Theodore E. Brown	2,500
Est. of Grace P. Train	1,500
Margaret P. Chew (Est. of Roger Chew)	1,000
Est. of Otto U. Von Schrader	2,500
Elliott A. Hunt	1,000

which constitutes all the debenture holders whose consent we have been called upon to secure, except one Mary Tacred $500, which will be secured if possible but there will be some delay.

Very truly yours,

/s/ John Janney

Enc.-Resolutions

EXHIBIT NO. 12(D)

Richard E. Dwight, Esq., April 22, 1943.
100 Broadway,
New York.

My dear Mr. Dwight—

You will find enclosed herewith signed copy of

certificate of Fidelity-Philadelphia Trust Company dated April 12, 1943 showing debentures outstanding under the two trust agreements and the amount of debentures, scrip and coupons deposited under the Debenture-Holders' Agreement, etc.

The time has arrived when the undersigned Committee should report all the material facts relating to the proposed Merger and Reorganization to those whom it represents and to the holders of undeposited debentures, and the Committee therefore requires that you and your clients furnish the Committee with the following in accordance with the Agreements of Settlement and Merger and the law:

(1) Copy of the notice of the stockholders' meeting and accompanying documents to be sent to the stockholders as provided in the Nevada Merger Statute.

(2) Certificate of an independent accountant certifying the principal amount of all of the debts justly owed by the Company (except amounts owed to Pioche Mines and included in the notes to be issued to emergency creditors) at the time of the Reorganization or immediately thereafter, within the meaning of these terms as used in the Reorganization Agreement dated as of July 8, 1942.

Mr. Simons' certificate dated February 7, 1943 does not comply with the requirements of the Reorganization Agreement in that it does not certify the outstanding debts at the date when the Reorganization is to be consummated, and Mr. Simon is not an independent accountant. To attempt to make the Reorganization Retroactively effective as of

July 8, 1942 is inconsistent with the Reorganization Agreement and in conflct with the Nevada Merger Statute. We should have a certificate of an accountant whom we can approve as independent and who is sufficiently well known for his certificate to carry weight with the Philadelphia group of debenture-holders. However, in view of our desire to push the plan to completion without further delay, we will accept Mr. Simons' certificate as sufficient for the purpose of establishing the principal amount of other debts as of July 8, 1942, but it will be necessary for us to have a supplemental certificate by Mr. Simon showing the other debts as of the last day of the month preceding our approach to the undeposited debenture-holders and an understanding as to what is to be done with obligations incurred subsequent to that date.

(3) A pro forma balance sheet giving effect to changes provided for by the Agreements of Settlement and of Merger.

(4) A statement of how the Surviving Company proposes to provide for any creditors who do not come in under the plan if there are any.

(5) A statement of what is meant by the holders of not less than 80% of the $50,000 of minority, non-assenting debentures. Does this mean the $54,500 on list enclosed in Mr. Clark's letter of October 22, 1942 to Mr. Janney?

(6) Form of income bonds, income notes and preference notes and of the Trust Agreement or Agreements under which they are to be issued.

(7) Any other material facts relating to the Reorganization and Merger.

We are still relying on Article IX of the Agreement of Reorganization relating to the long-term lease coupled with the assurances given by Mr. Lorenzen in his letter to Mr. Percy H. Clark of July 9, 1942.

Since the creditors as well as the stockholders are entitled to a full disclosure of the material facts, you should make such disclosure before we approach the outstanding creditors and stockholders. This will forestall questions and possible criticisms of the officers and directors of the two Pioche Companies as well as of our Committee. Failure to do this might very well stir up trouble and involve further delay.

If and when we are furnished with the above information and the several documents accord with the provisions of the Agreements of Settlement and Merger and the requirements of law, we will present the facts to our group of undeposited debenture-holders and would expect to secure the necessary consents without unreasonable delay.

You will find enclosed lists of the holders of undeposited debentures whom we expect to approach and of the debenture-holders on Mr. Janney's list whom he has not, as yet, approached.

Nearly a year has expired since our Committee signed the Agreement of Settlement. If we are not furnished with the information requested by the 15th of May, we will be forced to conclude the parties to the Agreement of Settlement, other than

ourselves, no longer desire to consummate the consolidation as agreed.

We also call your attention to the following:

(a) Mr. Simon includes under "Notes Payable", "Clarence M. Hawkins, $10,000." We understand this obligation will be provided for out of the income notes to be issued in payment of fees, as provided in the Agreement of Settlement.

(b) As Mr. Gerhard is to participate as a debenture-holder, this will increase the amount of outstanding debentures to $612,050 and this figure should be inserted in the Merger Agreement.

(c) The claim of Percy H. Clark for $289.98 is a claim for cash loaned to the Company. This figure includes the $1,000 shown by Mr. Simon under "Open Account Advances", but does not include the out-of-pocket expenses of his firm to the amount of $704.94.

(d) We understand it will be necessary to pay a certain amount of interest to District National Bank and E. W. Clark & Co. and that these accounts will be settled in cash.

Very truly yours,

Pioche Debenture-Holders Committee

/s/ Percy H. Clark

/s/ Albert P. Gerhard

/s/ Robert F. Holden

PHC/mb.—Enc.

Holders of Pioche Mines Consolidated, Inc., Debentures Who Have Not Deposited Their Debentures With Fidelity-Philadelphia Trust Company.

Those to be Approached by John Janney:

Name	Debentures of 1929	Debentures of 1930
Harry D. Belt		$1,000
Ivan F. Goodrich	$ 100	
A. J. Harper		1,000
Julie von S. Hodgson	1,000	
Hooper S. Miles	100	
Grace T. Whitney	1,000	
Samuel L. Munson		500
Wm. Innes Forbes		5,000
Mary Tancred		500
	$2,200	$8,000
Total	$10,200	

Those to be approached by the Debenture-Holders' Committee:

Name	Debentures of 1929	Debentures of 1930
Estate of James Crosby Brown	$3,000	
Estate of Dr. H. R. M. Landis	100	
Captain Stuart Farrar-Smith	5,000	
George Bispham Page	400	
Walter L. Rogers	1,000	
Estate of E. T. Stotesbury	10,000	
Estate of Mary S. Thayer		$5,000

Name	Debentures of 1929	Debentures of 1930
Mrs. Elizabeth Stanley Trotter	10,000	
Estate of Charles Wheeler, dec'd	10,000	10,000
Richard T. Naylor	5,000	
	$44,500	$15,000
Total	$59,500	

EXHIBIT NO. 12(E)

Dwight, Harris, Koegel & Caskey
Attorneys & Counsellors at Law, 100 Broadway
Cable Address "Yorklaw"
New York, April 24, 1943

Percy H. Clark, Esq.,
Messrs. Clark, Hebard & Spahr,
1500 Walnut Street Building,
Philadelphia, Pa.

Re: Pioche Mines

Dear Mr. Clark:

I enclose herewith a copy of a letter I have received from my client, which is self-explanatory.

Before answering, I wish to have the views of your Committee on this subject.

Very truly yours,

/s/ Richard E. Dwight

Pioche Mines Consolidated, Pioche, Nevada
551 Fifth Avenue, Suite 1810, New York City

Mr. Richard E. Dwight, April 22nd, 1943
100 Broadway, New York City.

Dear Mr. Dwight:

It seems to me that the Pioche Mines Consolidated should go forward without any further delay to carry out the merger agreement, which has been signed by all principal parties, in interest, if it can be carried out, and if it cannot be carried out we should determine the fact and without further delay proceed with the litigation in the Nevada court where it was interrupted when these negotiations commenced.

We are at this point in the proceedings: a stockholders' meeting must be called. At the stockholders' meeting when held we must present a pro forma balance sheet. This pro forma balance sheet must show one very important item which we must have, namely, "the amount of bonds which will remain outstanding after the merger is completed".

Also, in order to effect advantageous arrangements with the commercial creditors who possibly may accept securities in the merged company—and that is what we want to try to persuade them to do —we should be able to show them that practically all owners of the company's securities have definitely agreed to accept new securities.

You will remember that at the time of the taking of depositions in Philadelphia we were interrupted by the proposal from Mr. Clark that we could reach

a settlement of the litigation if only we would "talk to him for 20 minutes". Following this there was considerable discussion on our side as to how we could avoid a situation arising as it did previously in the conversion plan of 1938, where a small minority of debenture holders held out and were used as the basis for demands that were not in the agreement signed by the majority of the debenture holders.

To meet this situation it was proposed that we would put a clause in the Settlement Agreement that would remove any difficulty from minority debenture holders by binding the Philadelphia debenture holders to proceed without delay to secure the signature of the non-assenting debenture holders.

In drafting the Settlement Agreement there was a provision incorporated on page 13 binding the Debenture Holders Committee to use their best efforts to secure the consent of all non-assenting debenture holders, and at that time it was represented it could be expected that the Debenture-Holders' Committee recommendations would be accepted by most if not all of the remaining debenture-holders.

If we secured what we thought we secured in these provisions of the Settlement Agreement we would like to follow that through. If not, we will have to go back into Court and complete the litigation, or take such other steps as would seem most advisable, and I would like to have your opinion.

Very truly yours,

/s/ John Janney

EXHIBIT NO. 12(F)

Richard E. Dwight, Esq., April 26, 1943
100 Broadway, New York.

My dear Mr. Dwight:

I have your letter of the 24th enclosing John Janney's letter to you of the 22nd and have just talked with you on the telephone.

What Janney wants, as expressed in his letter of the 22nd, is just what we want. We understand you are preparing the information in letter form and will give us the best information you have available. When we receive your letter, we will approach those on our list promptly and advise you of the results.

Very truly yours,
PHC/mb Percy H. Clark

EXHIBIT NO. 12(G)

Richard E. Dwight, Esq., May 3, 1943
100 Broadway, New York.

My dear Mr. Dwight:

Your letter of April 29th enclosing copies of letters to you from John Janney dated April 27th and Richard K. Baker dated April 21st, were duly received.

No good purpose would be served by continuing the discussion as to who has been responsible for the delays of the past which it is now too late to

eleminate. It appears all are now agreed there have been unreasonable delays and that prompt action should be taken to consummate the Reorganization and Merger.

Mr. Janney states a pro forma balance sheet must be prepared for submission to the stockholders at a meeting to be called to complete the Merger. Our situation is similar to that occupied by Mr. Janney. We have stated and you agreed we should be provided with such a balance sheet when we approach the holders of undeposited debentures. With such a balance sheet accompanied by the notice of the stockholders' meeting and a statement of all of the material facts by the Company, as is usual in such reorganizations, we would be properly equipped to approach those on our list.

As you appear to have definitely decided not to furnish us with this information, we will approach the Philadelphia Trusts and Estates immediately and present the facts to them as clearly and concisely as we can. We hope to secure their consents to proceed with the Plan. After consents of the Trusts and Estates are secured, we anticipate no great difficulty in getting the consents of the others on our list and will ask Mr. Naylor to approach the Baltimore group. We will advise you of our progress.

Very truly yours,

PHC/mb. Percy H. Clark.

EXHIBIT NO. 13(A)

Copy July 28, 1943

E. G. Woods, Secretary
Pioche Mines Consolidated, Inc.,
Pioche, Nevada

Dear Mr. Woods:

I received Mr. Dwight's telegrams forwarding your telegrams to him this morning. After talking with him on the phone I have telegraphed you as follows:

> "Committee unwilling to guaranty performance of other peoples obligations particularly when some of other people unknown to them. Committee willing to ask for present deposits on condition that debentures and scrip will be returned if reorganization not consummated. Dwight approves this. Advise whether we shall ask for deposits."

which I now confirm.

I am afraid there may be some delay in getting all of those who have signed assent to deposit their debentures and scrip promptly, owing to absence on holidays, etc. However, we will do the best we can to secure prompt deposits.

It would seem to me the auditors could certify a pro forma balance sheet without waiting for deposits, provided they append a foot note to the balance sheet stating that it is based on the deposit of bonds by those who had agreed to deposit them. According to my understanding a pro forma balance sheet is nearly always one that shows what

the condition will be after a proposed plan has been consummated and it must be based on the assumption that certain things will be done. No matter how many certificates and guarantees are secured, the auditors can not certify that the balance sheet is correct until the proposed plan is consummated except on the basis of assumptions. How about the debentures held by District National Bank, Kansas City Structural Steel Company and those debentures whose holders have given their consents to John Janney?

Very truly yours,

Percy H. Clark

PHC:mac—cc: Mr. Dwight

EXHIBIT NO. 13(B)

Copy July 31, 1943

Messrs. Hartshorn & Walter
50 Congress Street, Boston, Mass.

Attention: Mr. S. G. Shaw

Gentlemen:

I have before me your letter of July 27 in which you ask me to certify the amount of Pioche bonds issued and the amount of bonds outstanding as of July 8, 1942. This information has already been certified to you by Fidelity-Philadelphia Trust Company as Trustee under the two Trust Agreements under which the bonds have been issued. Fidelity is the party in charge of these matters qualified to certify this information. It is true that I was formerly vice-president of Pioche Consolidated and the

outstanding bonds were issued subject to my supervision, but my information as to the amount of bonds issued and the amount outstanding as of July 8, 1942 comes from Fidelity Philadelphia Trust Company, and it would be an idle thing for me to again certify the information you already have. If you will advise me of any missing information which you require, I will do my best to secure it for you. It seems to me that as far as this end is concerned, you have been furnished with all the information you need to make your audit.

Very truly yours,

Percy H. Clark

PHC:mac—cc: Mr. Dwight.

EXHIBIT NO. 13(C)

Copy July 31, 1943

Mr. Richard E. Dwight,
100 Broadway, New York.

My dear Mr. Dwight:

I have a request from Messrs. Hartshorn & Walter that I certify to them the amount of Pioche bonds issued and the amount of bonds outstanding as of July 8, 1942. You will find enclosed copy of my reply.

Very truly yours,

Percy H. Clark

PHC:mac—Enc.

EXHIBIT NO. 13(D)

Copy July 31, 1943

Mr. Richard E. Dwight,
100 Broadway, New York, N. Y.

My dear Mr. Dwight:

This will confirm my telephone call with you of yesterday concerning the matters referred to in Mr. Wood's night letter to me dated July 29, a copy of which, I understand, he quoted in a telegram to you. We agreed that you would suggest the adjournment of the stockholders' meeting and that we ask the debenture-holders who have assented to the plan to deposit their bonds with Fidelity immediately to be held under the terms of the Debenture-Holders' Agreement dated February 1, 1939. The letter of transmittal depositing these bonds will give the depositors the right to withdraw their bonds at any time after December 31, 1943 if by that time the reorganization has not been consummated. Would it not be a good idea for Janney to get his group of holders of outstanding debentures to deposit their bonds with Fidelity at the same time under the same arrangement. Our Committee is rapidly getting itself in position to perform the obligations it has undertaken in the Agreement of Settlement, but no information has been given as to just what Pioche Consolidated is doing to perform its side of the obligations. Has not the time now come when you should advise us of your plans for the consummation of your side of the trade? Are

we not now in a position to complete the reorganization without much further delay?

Very truly yours,

Percy H. Clark

PHC:mac

EXHIBIT NO. 13(E)

Copy August 2, 1943

Mr. Richard E. Dwight
100 Broadway, New York

My dear Mr. Dwight:

I received this morning a letter from Mr. Woods dated July 29 and one from the Boston Committee of Stockholders and Creditors by Augustus L. Putnam and Richard K. Baker and both written from Pioche. Perhaps they sent you copies of these letters. It seems they have been upset by the last paragraph of the form of assent which has been signed by the holders of outstanding debentures. By the first paragraph of this form of consent, the debenture-holders who sign very definitely assent to the Agreement of Settlement and the Agreement of Merger, and by securing this assent, the Debenture-Holders' Committee has complied with the obligation undertaken by the Committee by Article VII of the Settlement Agreement. The last clause of this document was not intended to qualify the assent contained in the first paragraph but to cover a different matter, that is, the time of deposit of the debentures. This particular group of debenture-holders has heretofore been unwilling to deposit their debentures and I thought it would facilitate

the securing of consents to provide in the form that the debenture-holders would not be bound to deposit with Fidelity until and unless our Committee could assure them that the plan would be consummated in accordance with the two agreements. Now that the stockholders' meeting has been called, and the company is ready to go ahead with the merger, I believe the debenture-holders will be fully protected if they reserve in letter of transmittal the right to withdraw their bonds from deposit if the reorganization is not consummated by December 31, 1943.

I have not replied to the letters received from Mr. Woods and Messrs. Putnam and Baker and am afraid it will create only more confusion if I do so. I have arranged with your secretary to talk with you on the telephone tomorrow because I would like to know whether the deposit of bonds now will straighten out the above mentioned difficulty.

Very truly yours,

Percy H. Clark

PHC:mac

EXHIBIT NO. 13(F)

Dwight, Harris, Koegel & Caskey

100 Broadway

Copy New York, August 4, 1943

Percy H. Clark, Esq.,
Messrs. Clark, Hebard & Spahr,
1500 Walnut St. Bldg., Philadelphia, Pa.

Re: Pioche Mines, Inc.

Dear Mr. Clark:

Your letter of August 2nd was duly received, con-

firming your telephone conversation with me of yesterday.

I am quite satisfied with the deposit of the bonds and am telegraphing to that effect to Pioche.

I hope that the bonds can be gotten in reasonably promptly, as there may be an opportunity to lease the mines this fall.

Very truly yours,

Richard E. Dwight

EXHIBIT NO. 13(G)

Night Letter

Copy August 5, 1943

P. H. Clark, Chairman
The Debentures Holders Committee
Walnut St. Bldg., Phila.

Please telegraph total amount of bonds which you represent that are definitely committed to exchange old bonds for new under Settlement Agreement as soon as merger is completed by stockholders meeting voting approval of Merger Agreement and filing papers are provided by Nevada statutes also those you represent who are not definitely committed to exchange.

E. G. Woods, Secretary

[Printer's Note: Exhibit 13(h) is a duplicate of Exhibit 20 set out at page 484, Exhibit 13(i) as Exhibit 31 set out at page 496, 13(j) as Exhibit 35 set out at page 499.]

EXHIBIT NO. 13(K)

Copy September 23, 1943

Mr. Richard E. Dwight
100 Broadway, New York

My dear Mr. Dwight:

I received late yesterday afternoon the following telegram:

> "From your letter dated Sept. 16 received today we presume that your committee is now in position to certify to auditor the amount of bonds on your list that will remain outstanding upon confirmation of merger.
>
> Pioche Mines Consolidated."

to which I have sent the following reply:

> "All bonds on Committee's list have been deposited except $4100 which have been definitely promised in writing and Committee certifies none of the bonds on its list will remain outstanding when merger and reorganization provided for in agreements are consummated.
>
> Debenture Holders' Committee
> By Percy H. Clark and
> Albert P. Gerhard"

Before sending this reply I read it to Mr. Lorenzen and he approved. I do not know what is meant by the word "upon confirmation of merger" at the end of Pioche Consolidated's telegram. The deposited debentures are held by Fidelity as depositary under the Debenture-Holders' Agreement dated February 1, 1939 which is made a part of the Settlement Agreement as provided in Article VII of that

Agreement. Fidelity has outstanding receipts for the deposited bonds. They are pledged as collateral for amounts loaned by Fidelity to the Debenture-Holders' Committee which have been used to pay the Committee's expenses. The preference notes with the stock bonus provided for in the Settlement Agreement are to be issued to raise the cash required to cover all expenses. See Article VI of the Settlement Agreement, also I paragraphs B and C, and the common stock to be issued to the debenture-holders "shall be issued to Fidelity-Philadelphia Trust Company for the account of the debenture-holders". (Article I D) It seems perfectly clear that the Fidelity can not deliver the deposited bonds to Pioche Consolidated or cancel them until it receives the new securities and cash and is satisfied that the obligations undertaken by the Pioche Companies and the Debenture-Holders' Committee by the agreements have been performed. This means a settlement such as is usual in similar cases.

The Committee's telegram above quoted should furnish the accountants with the basis for the certification of a pro forma balance sheet insofar as the outstanding debentures for which our Committee is responsible is concerned and presumably this is what Pioche Consolidated wants. As I have repeatedly stated it seems clear to me Pioche Consolidated should prepare a program stating what is to be done at the final settlement which seems to be an essential prerequisite to the consummation of the merger. Perhaps you can suggest some other way to conclude this business. It should be concluded

prior to December 31, 1943, after which date the holders of debentures recently deposited will have the right to withdraw their debentures.

I enclose a copy of this letter in case you want to forward it to Pioche.

Very truly yours,

Percy H. Clark

PHC:mac—Enc.

P.S.—The enclosed copy of letter from Hartshorn and Walter has come in this afternoon. What answer should I give to this? I also enclose for your information copy of my second telegram of today to Pioche Consolidated.—PHC

[Printer's Note: Exhibit 13(l) is a duplicate of Exhibit 38 set out at page 501.]

EXHIBIT NO. 14(A)

Western Union Day Letter

Copy March 19, 1931

John Janney,

Hotel St. Francis, San Francisco, Calif.

It will be necessary to deposit about five thousand dollars with Fidelity to meet April first coupons on outstanding second series debentures Stop Clark and Company now have about fourteen hundred dollars with another thousand promised by Whitman on March Twenty-eight Stop I can borrow from Clark and Company the necessary additional

amount to meet this interest payment plus additional one thousand dollars to cover initial payment to Foster Hefferman on demand note of company secured by debentures now held by Clark and Company against unpaid subscriptions and by the subscriptions themselves with understanding that first payments reecived on subscriptions will be applied to note Stop If you want me to consummate this arrangement along lines indicated telegraph me authority to sign note and collateral letter on behalf of the company not later than March Thirtieth Stop Important airmail letters concerning Foster Hefferman mailed seventeenth and eighteenth addressed Hotel Utah with request to forward.

Percy H. Clark

Chge. to Clark, Clark, McCarthy & Wagner

EXHIBIT NO. 14(B)

Western Union Telegram

Copy 1931 Mar 20 am 7 09

CD 114 40 NL—Sanfrancisco Calif 19

Percy H. Clark, 1529 Walnut St., Philadelphia, Pa.

You are authorized to execute note for company and write letter in compliance with and as per your telegram of today will await with interest air mail letters mentioned your telegram expect to be here for several days best regards

/s/ John Janney

EXHIBIT NO. 15

Fidelity-Philadelphia Trust Company

Copy November 22, 1943

Mr. E. G. Woods, Secretary,
Pioche Mines Consolidated, Pioche, Nevada.

Dear Sir:

At the direction of the Pioche Mines Consolidated Debenture-Holders' Committee as expressed in their communication dated today and addressed to us as Depositary under the Debenture-Holders' Agreement dated as of February 1, 1939, we enclose a requisition containing a list of the names and addresses in which the Income Bonds and shares of stock appertaining to $582,350 principal amount of deposited Debenture Bonds shall be issued.

When such securities are issued and ready for delivery, they shall be delivered to Fidelity-Philadelphia Trust Company, Depositary, 135 South Broad Street, Philadelphia 9, Pennsylvania.

Enclosed is a copy of the communication from the Debenture-Holders' Committee above referred to, in which other information pertinent to the transaction is outlined.

Very truly yours,

H. W. Latimer, Assistant Secretary

HWL:DF

[Printer's Note: Balance of Exhibit 15 is a duplicate of Exhibit W10 set out at page 418.]

EXHIBIT NO. 16(A)

Dwight, Harris, Koegel & Caskey
Attorneys & Counsellors at Law, 100 Broadway
Copy Cable Address "Yorklaw"
New York 5, November 12, 1943

Richard E. Dwight, Ralph S. Harris, Otto E. Koegel, John F. Caskey, Frank C. Fisher, Frederick W. R. Pride, Bruce R. Tuttle, William W. Owens, John R. McCullough, Frederick W. P. Lorenzen, Andrew E. Stewart, Harry J. McIntyre

Percy H. Clark, Esq., Clark, Hebard & Spahr,
1500 Walnut Street, Philadelphia 2, Pa.

Dear Mr. Clark:

Some time ago I drafted a letter which Mr. Dwight signed, explaining in substance the agreement which you and I had reached with respect to the closing. In answer, Mr. Dwight received back letters of November 5, 1943 and November 8, 1943, of each of which I enclose a copy. Apparently matters are about to reach a complete deadlock.

If you have any suggestions, you might advise Mr. Dwight, because I shall be out of town for the next two weeks. Certainly someone is going to have to give in, because every step in the reorganization cannot be accomplished first.

Very truly yours,

/s/ Frederick W. P. Lorenzen

Enclosures—2

EXHIBIT NO. 16(B)

Pioche Mines Consolidated, Pioche, Nevada

Copy November 5, 1943

Richard E. Dwight,
100 Broadway, New York, N. Y.

Dear Dick:

Your letter of October 28th is duly received, and the adjourned stockholders' meeting has had it under consideration.

You say it appears that there are "no very substantial differences" between Mr. Clark and our company as to the construction of the settlement agreement. The principal difference is this:

The Boston creditors occupied a position of having loaned large sums of money to the Pioche Mines Company, and they and myself were almost the only creditors of that company. Mr. Clark's claim that the consolidated company is a creditor of that company is pure fiction, and everyone has agreed to that.

This preferred position of the Boston creditors which is a claim upon the most valuable assets here involved, they have agreed to relinquish, and accept new securities in the merged company based upon the understanding that the Philadelphia debenture holders had agreed to accept new securities.

It must be remembered that the Boston committee would not even consider this matter until after the Philadelphia bondholders had signed the agreement definitely committing them to do this. The Boston creditors have given a power of attorney to accept

the new securities for the old and are definitely committed to exchange the securities immediately upon the merger being voted by the stockholders' meeting.

The settlement agreement was signed with the understanding and with representations made by Mr. Clark and others, that they were obligated immediately upon the forming of the new company to take the new securities in exchange for the old as set forth in the settlement agreement.

If the Company goes forward with the proposal of Mr. Clark we are left in a very strange position. The merged company will be formed; the properties of the Pioche Mines Company will automatically become a part of its assets; the prior claim of the Boston creditors will be rubbed out; they will have securities in the new company but Mr. Clark will have securities in the old company; he will stand out in his round table conference and demand what he wishes to demand. The minority bondholders who have signed on conditions created by him will withdraw from the agreement. The majority bondholders will involve the whole company in litigation by the claims they will make.

This is as far from what was contemplated in reaching the settlement and as far from what was represented by Mr. Clark, as day is from night, and we do not propose to walk into this trap. The Boston creditors must be protected and Mr. Clark must exchange bonds of the Philadelphia committee for new bonds contemporaneously with the exchange of the Boston creditors' claims, and contemporaneously

with the property of this company's being merged into the properties of the consolidated companies.

With best regards,

Sincerely yours,

JJ/gq. /s/ John Janney

EXHIBIT NO. 16(C)

Pioche Mines Consolidated, Pioche, Nevada

Copy November 8, 1943

Mr. Richard E. Dwight,
100 Broadway, New York, N. Y.

Dear Mr. Dwight:

Your letter of October 28th has been brought before the adjourned meeting of stockholders and I am directed to answer as follows:

We cannot find any provision in the settlement agreement described as per paragraph two of your letter, namely, that "all of the debentures deposited with his committee will be turned in for securities of the new company when the reorganization has been "consummated" as provided in the settlement agreement."

On the contrary the contract provides that the new company will "either at the time of the reorganization or immediately thereafter * * * issue the following securities upon the following basis".

Elsewhere in the contract it is provided that "this issue of stock together with the issue of new income bonds above provided for in 1-A shall discharge all claims of the debenture holders of both principal and interest."

You will note that the merger agreement provides that pursuant to the laws of the State of Nevada "hereby agree to merge, etc". Under the laws of the State of Nevada the merger is consummated when the stockholders approve the merger contract and file the papers with the secretary of state.

The contract provides that the bonds be registered bonds and of course the stock is to be issued in the names of the stockholders unless the stock is to be issued in the name of a Trust Company involving an unnecessary additional transfer charge.

It was Mr. Clark who required that the reorganization papers be redrafted so as to be a "merger" and not a "consolidation".

This corporation has been ready to call a stockholders' meeting since the merger agreement was finally approved by the Philadelphia attorneys late in December, 1942. We could not call the meeting until July 15th, 1943, because the Philadelphia bondholders' committee, as they admitted in their letter, had made no effort up to March 1942 to secure the signatures of the dissenting bondholders, as they were required to do under the settlement agreement. Afterwards they wrote that they were attempting to do so, when they received the ultimatum contained in your letter to them enclosing my letter of March 24th. The meeting was called for July 15th based on their assurances that these consents had been obtained.

The time since July 15th has been consumed in having a definite check up from the debenture holders' committee and the Trust Company verifying

these assurances. The Trust Company is now refusing to give us the names of the persons to whom the bonds and stock is to be issued, stating that they have no instructions from the debenture holders' committee. We presume Mr. Clark has sent you copies.

The meeting is ready and has been ready since July 15th to vote the approval of the merger agreement and file same with the Secretary of State, and have been anxious to go forward with the merger of these companies, and we have again written the Trust Company, as per copy enclosed, for the list of the names which we must have to issue the securities which must be issued, immediately after the voting and filing of the merger agreement.

With reference to the remaining paragraphs of your letter:

1. The filing of the merger certificate will be done as soon as the stockholders vote the approval of the merger contract. These papers are prepared and are in accord with the certificates heretofore approved by Percy Clark and the Nevada attorney for the Trust Company, Mr. Thatcher. If Mr. Clark wishes to change his recommendation on this he will have to attend the stockholders' meeting and see that in effecting this change no delay is created in the proceedings of the company.

2. The merger agreement provides that the merger shall be "pursuant to the laws of the State of Nevada in such cases made and provided." We are advised that the Nevada law is to this effect, namely, that the approval of the contract of merger

and filing same with the Secretary of State constitutes the conveyance of the properties and no further conveyance is required.

At the time the stockholders' meeting votes the approval of the merger I am to deliver a deed to the mill site property, a lease to the office building, and under Clause 4 of the settlement agreement the stock of the Nevada Volcano Mines Company held in trust. These are all held in escrow by the Secretary of the company to be delivered at that time.

The bondholders' committee should have been present on July 15th through some representative to facilitate these matters. If they wish to examine these papers they should be present at the time they are delivered. The contract requires that we should make valid delivery of these items, but it does not require that the papers should be approved by the debenture holders' committee, and it certainly does not require that we shall attend meetings in such parts of the country and at such time as they propose for the purpose of conferences about these matters.

3. Mr. Clark wishes, at the time of closing, a certificate given by Mr. Baker, the Exploration and myself, making a further statement. Please have him cite the clause of the settlement agreement which requires such a certificate. All the above have signed the agreement effecting the amounts that were due from the company to them, and we can find no further certificate being required in the terms of the settlement agreement.

It is the sense of the meeting that no further negotiation and no further changes will be made in the terms of the agreement with the Philadelphia debenture holders' committee, but we will perform the agreement already executed and fully comply with all of its terms and conditions without creating any delay.

4. There is nothing in the contract that requires the payment to E. W. Clark and Company of the amount of their note as a condition precedent to the cancellation of $40,000 of bonds. It is provided that they will accept payment in cash for the note and that this will be paid from the sale of preference notes. The company will of course not realize the cash to make this payment until after the merger is consummated. It therefore cannot be paid as a condition precedent in the forming of the merged company by any conditions that we can see in the settlement agreement.

In this connection we refer to section 15 which provides that 80% of all creditors must consent in writing to the terms of the settlement agreement (within 90 days after the signature hereof). We obtained the consent of 80% of the creditors and called upon the debenture holders' committee to obtain the consent of the minority debenture holders, —and while they finally in June 1943 stated that they had obtained the consent of these debenture holders there is no evidence that they have, and there are contradictory communications from the debenture holders' committee indicating that the

consents obtained from the minority are on different terms from the consents we obtained.

We note that the merger agreement provides for the debenture holders' committee obtaining the consent of the undeposited debentures "to this plan of reorganization", and Mr. Baker and Mr. Janney are required to secure the consents "to this agreement". It is presumed that these words mean the same thing, and that all parties are to secure the consent of those designated to the agreement.

It is further provided that the E. W. Clark and Company note is to be paid from the sale of preference notes (see I-C-4).

In the view of this meeting it is hard to reconcile the delays caused by the debenture holders' committee and the cooperation of the Trust Company with them in this regard, with the provisions of the contract that the merger may be consummated "at the earliest possible moment." The delay in securing the consents of the minority bondholders and the obvious failure of the committee to make any effort to secure their consent to the settlement agreement places them in a position of being responsible for the losses entailed in the delay they have created.

We hope that you concur with us in this from the legal point of view, for the reason that during the past ten years this company's properties have remained idle due to similar interferences on the part of the debenture holders' committee who are charged in our cross complaint with a conspiracy with the Trust Company and others to prevent the operation of these properties, based on which a five

million dollar counterclaim was filed against them and allowed by the court as a part of the amended Answer.

The stockholders' meeting is prepared to go forward with the consummation of the merger as soon as we receive from the Trust Company verification of the statement made by Mr. Clark's committee, in their reply to our telegram of August 10th, but cannot issue the securities because the terms of the contract make it necessary for us to have a list of the names of those who are obligated to accept the new registered securities, and the company is required to issue the new securities in these names immediately upon the consummation of the merger.

The contract has been stretched to imply that the "merger agreement" must be approved by the Philadelphia attorneys. It nowhere provides that they shall approve any other certificates, deeds or other papers.

By Order of the Stockholders' Meeting,

Respectfully,

Pioche Mines Consolidated, Inc.,
E. O. Swande, Secy.

EXHIBIT NO. 16(D)

Copy November 16, 1943

Richard E. Dwight, Esq.,
100 Broadway, New York, N. Y.

My dear Mr. Dwight:

Since receiving Mr. Lorenzen's letter of the 12th

with enclosures I have received a letter of the same date signed E. G. Woods, Secretary, a copy of which and of my reply you will find enclosed. The last two paragraphs of John Janney's letter to you of November 5th seem quite pertinent. Of course, we have never suggested such a trap as he mentions which might prejudice the interests he represents, and on the other hand we see no reason why we should be put in a position which might be used to the prejudice of the interests we represent. John Janney states

> "Mr. Clark must exchange bonds of the Philadelphia Committee for new bonds contemporaneously with the property of this company's being merged into the property of the consolidated company."

This is exactly what our Committee is prepared to do but they insist the closing must be a final closing at which all parties perform their obligations contemporaneously and that after the settlement no one shall be in a position to spring a trap such as Janney has in mind.

Creditors are out of place at stockholders' meetings and nothing could be accomplished by having representatives of our Committee attend the adjourned meeting in Pioche on the 28th. The closing should be at or near Carson City where the Merger will be consummated by the filing of the duly certified copy of the Merger Agreement. The forms of certificates attached to the Merger Agreement have never been submitted to me for my approval and

so far as I know Mr. Thatcher has never approved them. If Thatcher approves the forms of these certificates and of the documents delivered to the Secretary as set forth in Mr. Woods' letter, we will accept Mr. Thatcher's approval as sufficient for our purposes.

I think it would facilitate the conclusion of the reorganization greatly if you and I could sit down together and work out the details of the closing settlement. I can go to New York for a conference with you in the morning or afternoon of Thursday. Please let me know by telephone or telegraph.

Very truly yours,

Percy H. Clark

PHC:mac

[Printer's Note: Exhibit 16(e) is a duplicate of Exhibit 69 set out at page 550, 16(f) as Exhibit SM-6 set out at page 298, 16(g) as Exhibit SM-8 set out at page 299.]

EXHIBIT NO. 16(H)

Copy December 14, 1943

Mr. Richard E. Dwight,
100 Broadway, New York, N. Y.

My dear Mr. Dwight:

I have your letter of the 7th and copy of John Janney's letter to George B. Thatcher of the 10th.

I am glad to note that John Janney is now satisfied with our Committee's assurances. The Commit-

tee feels it has been definitely bound to the same extent as now ever since it secured the written consents of the outstanding bondholders on its list. There is nothing further the Committee can do until the stockholders vote the adoption of the merger and I hope that final settlement will take place very shortly after the 17th. Why not a Christmas present or at least a New Year's greeting to the creditors and stockholders.

Best wishes for a Merry Christmas and a Happy New Year.

Very truly yours,

Percy H. Clark

PHC:mac

[Printer's Note: Exhibit 17(a) is a duplicate of Exhibit 91 set out at page 1030.]

EXHIBIT NO. 17(B)

Western Union Telegram

Copy December 29, 1943

Thatcher and Woodburn
206 North Virginia St., Reno, Nevada

Have copy of Janney's letter to you of eighteenth but no copy of Bakers letter or of income bond enclosed. Please send your comments on form of bond by air mail.

Percy H. Clark

EXHIBIT NO. 17(C)

Thatcher and Woodburn
Attorneys and Counsellors at Law
206 North Virginia Street, Reno, Nevada

Copy — Air Mail

Percy H. Clark, Esq. — December 29, 1943
of Clark, Hebard & Spahr
1500 Walnut Street Building
Philadelphia, Pennsylvania

Dear Mr. Clark:

I enclose herewith the form of bond which was sent to me. I am sorry I neglected to forward it to you but thought you had received it from Mr. Baker.

I am not as familiar as I might be with all of the negotiations and other agreements between you, but the form of the bond appears to me to conform to the understanding which you reached.

Kindest personal regards,

Yours sincerely,

/s/ Geo. B. Thatcher

GBT:ct—Encls.

EXHIBIT NO. 17(D)

Copy — January 4, 1944

Richard E. Dwight, Esq.
100 Broadway, New York

My dear Mr. Dwight:

I have received from Mr. Thatcher a form of Pioche "4% income debenture bonds" sent to him by Mr. Baker. In my opinion this form of bond

does not contain the usual provisions for such instruments as required by the Settlement Agreement. Any differences of opinion which may exist on this point are purely academic because of the provisions of the "Trust Indenture Act" of August 3, 1939 which specifically applies to securities issued in exchange for securities of the same issuer although it may not be necessary to register such securities under the Securities Act. Failure to comply with the requirements of this Act might subject the Pioche Companies and their officers to the penalties imposed by the Act. Fidelity-Philadelphia Trust Company and the members of the Debenture Holders Committee might very well become involved. Have you called this Act to the attention of Mr. Janney and the Pioche Companies?

Very truly yours,

Percy H. Clark

PHC:mac

EXHIBIT NO. 18(A)

Hartshorn and Walter
50 Congress Street, Boston, Mass.

Copy August 12, 1943

Percy H. Clark, Esquire
1500 Walnut Street Building
Philadelphia (2), Pa.

Dear Sir:

Apparently there has been a misunderstanding in

regard to our request to you for confirmation of outstanding bonds. We would like to avail ourselves of your offer to secure for us additional information.

The Fidelity-Philadelphia Trust Company has certified to us that there were outstanding as at July 8, 1942, $687,300.00 face amount of debentures.

We would like to have either you or The Fidelity-Philadelphia Trust Company confirm to us the total amount of these bonds which have been paid for.

Very truly yours,

Hartshorn and Walter

FGS:G

[Printer's Note: Exhibit 18(b) is a duplicate of Exhibit W-8 set out at page 407.]

EXHIBIT NO. 18(C)

Copy January 18, 1944

Messrs. Hartshorn & Walter
50 Congress Street, Boston, Mass.

Gentlemen:

Our Committee has received a request from E. G. Woods, Secretary of Pioche Mines Consolidated, Inc., that we send to you a statement giving you the specific number of debentures represented by our Committee which have consented to the Settlement Agreement. Mr. Percy H. Clark has already given you by his letter of August 27, 1943 considerable in-

formation concerning the outstanding debentures of Pioche Mines Consolidated, Inc. You will find enclosed herewith copy of letter dated November 22, 1943 addressed by the Committee to Fidelity-Philadelphia Trust Company, a copy of which was forwarded by Fidelity to Pioche Mines Consolidated, Inc. This letter will give you further information concerning the debentures, including the number of debentures deposited with Fidelity as depositary.

The undersigned Committee represents the deposited debentures, all of which have consented to the Settlement Agreement and the Merger Agreement on the terms and conditions set forth in the several agreements, letters, Assent and Agreement to Deposit, Letter of Transmittal and other documents, copies of which are on file with Fidelity-Philadelphia Trust Company and Pioche Mines Consolidated, Inc. and all of which I assume you have seen. We trust this is the information you require.

Very truly yours,

Pioche Debenture Holders Committee

By Percy H. Clark
Albert P. Gerhard

mac—cc: E. G. Woods

[Endorsed]: Filed May 26, 1948.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Commonwealth of Pennsylvania,
County of Philadelphia—ss.

Miles S. Altemose, being first duly sworn deposes and says:

That he is a Vice-President of Fidelity-Philadelphia Trust Company (hereinafter referred to as "Fidelity"), one of the plaintiffs in the above entitled action; that as such Vice President he is in charge of Fidelity's Corporate Trust Department and authorized to execute this affidavit for and on behalf of Fidelity; that he has been in charge of said Department either as a Vice-President or an Assistant Secretary of Fidelity continuously since 1920; that he is personally familiar with the matters and things averred in the pleadings, Motions and supporting affidavits heretofore filed in the above entitled action, insofar as such matters and things relate to Fidelity's participation therein and interest as Trustee under the two Pioche Trust Agreements, dated January 2, 1929 and October 1, 1930, respectively, and as Depositary under the Pioche Debenture Holders Agreement dated February 1, 1939;

That he has in his custody as Vice-President in charge of the Corporate Trust Department of Fidelity, the following:

(a) Original counterpart of Trust Agreement be-

tween Pioche Mines Consolidated, Inc. and Fidelity-Philadelphia Trust Company, as Trustee, dated January 2, 1929, together with original counterparts of two Supplemental Trust Agreements between the same parties dated August 31, 1932 and April 1, 1936, copies of which are attached to the Complaint in the above entitled suit as Exhibits "A", "B" and "C".

(b) Original counterpart of Trust Agreement between Pioche Mines Consolidated, Inc. and Fidelity-Philadelphia Trust Company, as Trustee, dated October 1, 1930, together with original counterparts of two Supplemental Trust Agreements between the same parties dated August 31, 1932 and April 1, 1936, copies of which are attached to the Complaint in the above entitled suit as Exhibits "D", "E" and "F".

(c) Original counterparts of Debenture Holders Agreement dated as of February 1, 1939 by which Fidelity was named as Depositary. A copy of said Agreement is attached to the Complaint in the above entitled suit as Exhibit "J"; that said Agreement was executed in a number of counterparts, all of which have been deposited with Fidelity. Deponent further avers that there have been deposited with Fidelity, as Depositary as aforesaid, $597,600 principal amount of said Debentures of 1929 and 1930 (together with Scrip and Coupons) out of a total of $687,300 principal amount of said Debentures, certified by Fidelity as having been issued under the above mentioned Trust Agreements of 1929 and 1930; and that the amount so deposited has been admitted by the defendants.

(d) Original counterparts of authorization dated June 8, 1942, referred to in Article VII of the Debenture Holders Agreement, copy of which is attached to the Supplemental Complaint filed in the above entitled suit as Exhibit "D"; that said authorization was executed in a number of counterparts by more than a majority of the outstanding Debentures, coupons and scrip, all of which counterparts have been deposited with Fidelity.

(e) Copy of the Merger Agreement dated October 23, 1942, copies of which have been filed with Fidelity by both Pioche Consolidated and Debenture Holders Committee, and a copy of which duly certified by the Secretary of State of the State of Nevada is attached to the Supplemental Complaint as Exhibit "B".

(f) Copies of letters relating to the matters involved in the above entitled suit written by Fidelity to defendants and other parties, together with the original replies to said letters.

That deponent has read all of said pleadings and documents, is familiar with their contents and the actions of Fidelity in relation to the subject matter to which they relate.

In support of the Motion for Summary Judgment filed on behalf of Fidelity in the above entitled suit, deponent states the following facts of his own personal knowledge, unless otherwise indicated, with respect to certain allegations in said Complaint and Supplemental Complaint and the Answers thereto filed by the defendants:

I

With respect to the allegations in the original Complaint filed by Fidelity as one of the plaintiffs in the above entitled action, deponent avers that the allegations in paragraph IV relating to the default by Pioche Consolidated in payments of coupons appertaining to said Debentures, and the institution by Fidelity, as Trustee, of the original action upon the written request of the holders of more than 50% in aggregate principal amount of outstanding Debentures of each of said issues of 1929 and 1930, are true and correct. Deponent does not refer in this affidavit to other allegations in the original Complaint for the reason that the issues raised by said allegations and the Answer thereto filed by the defendants were altered as a result of the execution of the Settlement Agreement of 1942 and Merger Agreement of 1943 between the defendants, the Debenture Holders Committee and other parties in interest, so that the material issues now involved are presented by the Supplemental Complaint and Answer thereto, which Supplemental Complaint was filed following the execution of the aforesaid Settlement Agreement and Merger Agreement.

II

With respect to the allegations of Paragraphs I, II and III to the Supplemental Complaint, deponent refers to the affidavit of Percy H. Clark, Esquire, filed in support of plaintiff's motion for Summary Judgment.

III

That the allegations in Paragraphs IV, V, VI, VII, VIII, X, and in subparagraphs (a), (b), (c) and (f) of Paragraph XII of said Supplemental Complaint are true. With respect to the allegations in subparagraphs (d), (e) and (g), reference is made to the aforesaid affidavit of the said Percy H. Clark, Esquire, and to Section V of this affidavit.

IV

With respect to the allegations in Paragraphs XIII, XIV and XV of the said Supplemental Complaint, reference is made to the aforesaid affidavit of the said Percy H. Clark, Esquire.

V

That there is no basis in fact for the averments repeated in several paragraphs of the Answer to the Supplemental Complaint, to the general effect and tenor that Fidelity has conspired with the Debenture Holders Committee for the purpose of delaying, hindering or preventing performance of the Settlement Agreement of 1942; on the contrary Fidelity has always endeavored to fulfil its fiduciary obligations as Trustee and Depositary, and has acted at all times on the advice of competent counsel, including its disinterested general counsel, Morgan, Lewis & Bockius, since April of 1944, whenever any questions arose as to Fidelity's obligations as Trustee and Depositary; that in particular there is no basis in fact for those averments in subparagraph

(g) of paragraph 12 of the Answer referring to the general question as to whether the new Income Bonds complied with the Trust Indenture Act, which averments purport to show an intent and desire on the part of Fidelity to hinder, obstruct and delay performance of the Settlement Agreement; that the question as to compliance with the Trust Indenture Act was first raised by deponent, and not by the said Percy H. Clark, when the form of new Income Bonds was first exhibited to Fidelity, in January of 1944, said question having been raised by deponent because of his wide experience as a corporate trust officer and his handling as such of many and diversified types of corporate obligations; and that in raising the question of compliance with the Trust Indenture Act, and in obtaining an opinion from its general counsel in regard thereto, deponent's sole motive in so doing was to protect his Company from the serious penalties that would be imposed on it as a corporate fiduciary, if it should later have been held that the form of the new Income Bonds and their exchange for the old Debentures violated the provisions of said Act and the Rules and Regulations of the Securities and Exchange Commission. Deponent further avers that there is no basis in fact whatever for the allegations set forth in paragraph 16 of the Answer to the Supplemental Complaint, which allegations are not responsive to any averments contained in paragraph XVI of the Supplemental Complaint.

Deponent further avers that Fidelity's position in this matter, as Trustee and Depositary, from the

time when a dispute arose between the defendants and the members of the Debenture Holders Committee regarding the construction placed on certain provisions of the Settlement Agreement, and the method to be followed in performing it, is fully disclosed in a series of letters written to Fidelity by Pioche Consolidated and Mr. Janney and written to Pioche Consolidated and Mr. Janney by Fidelity or its counsel, copies of which letters, sworn to as correct copies, are attached as exhibits to the affidavit of Mr. Janney filed in these proceedings in support of the defendants' Motion for an Order for Deposit in Court, said letters being identified by the letters "DM", together with Exhibits "F-1", "F-2" and "F-3" to the affidavit of deponent contra said Motion and as Exhibit "R-1" to the affidavit of Thomas B. K. Ringe, Esquire, contra said Motion, all of which have heretofore been filed in these proceedings; that Fidelity's position is further disclosed by copies, sworn to as correct copies, of letters set forth in the affidavit of Richard K. Baker, in support of his Motion to Intervene, said exhibits being identified as Exhibits 41, 42, 48, 50, 51, 53, 54, 57, 58, 59, 62, 65, 66, 67, 81, 82 and 83 to said affidavit; that in order to avoid a further enlargement of the already voluminous record in these proceedings which would result from attaching certified copies of all of said letters to this affidavit, deponent asks that the aforesaid copies of letters attached as exhibits in support of the said Motions of the defendants and of Richard K. Baker heretofore filed in these proceedings be considered a part of this affidavit by reference.

That a reading of the aforesaid letters should be sufficient to dispel any doubts cast upon Fidelity's conduct by the extravagant averments in the Answer to the Supplemental Complaint, alleging conspiracy and bad faith on its part, it appearing to deponent that the disputes which have arisen between the defendants and the members of the Debenture Holders Committee resolve themselves into a difference of opinion as to qustions of law relating to the construction of written documents and the Nevada law applicable to merged corporations, and do not involve a dispute as to the material facts.

VI

Deponent is advised, believes and therefore avers that the averments set forth in paragraph 17 of the Answer to the Supplemental Complaint involve questions of law and do not involve a dispute as to material facts; and further that the averments in paragraphs 18 and 19 of the Answer to the Supplemental Complaint are irrelevant and immaterial to the issues raised by the pleadings, Motions and supporting affidavits filed in this cause;

That in further reference to the averments in paragraph 15 of the Answer to the Supplement Complaint, and for the purpose of refuting the allegation therein to the effect that Fidelity-Philadelphia Trust Company did not furnish necessary information to Messrs. Hartshorn & Walter, there is attached hereto as Exhibit A-1 a copy of letter dated July 14, 1943 from Fidelity-Philadelphia Trust Company to Messrs. Hartshorn & Walter,

which copy deponent hereby certifies is a true and correct copy of the original.

/s/ MILES S. ALTEMOSE

Sworn to an dsubscribed before me this 17th day of May, 1948.

(Seal) /s/ CHAS. McCALL
Notary Public
My Commission Expires January 7, 1951.

EXHIBIT NO. A-1

Fidelity-Philadelphia Trust Company

Copy July 14, 1943
Hartshorn and Walter
c/o Pioche Mines Consolidated, Inc.
Pioche, Nevada

Gentlemen:

At the request of Pioche Mines Consolidated, Inc. in letter dated July 10, 1943, we certify the following:

1. Interest has been paid in cash to January 1, 1931 on the Debentures issued under Agreement dated January 2, 1929 and to April 1, 1931 and for the six months' period due October 1, 1937 on the Debentures issued under Agreement dated October 1, 1930.

2. No provision is made in the Extension Agreement for payment of interest on unpaid coupons not exchanged for scrip. In the original Agreements providing for the issuance of the two issues of Debentures, it is provided that in case of default in

payment of interest, interest shall accrue on overdue instalments of such interest at the rate of 7% per annum, etc.

3. The maturity dates of both issues of Debentures were extended by Supplemental Agreements to October 1, 1941, which is the maturity date of the last coupons attached to each issue of Debentures.

4. The issuance of scrip in exchange for interest coupons not paid in cash was attended to at the office of E. W. Clark and Company, 16th and Locust Streets, Philadelphia, which office should confirm your inquiries concerning said scrip.

Very truly yours,

H. W. Latimer, Assistant Secretary

HWL:EN

[Endorsed]: Filed May 26, 1948.

[Title of District Court and Cause[

COMPLAINT IN INTERVENTION

Comes now Richard K. Baker, Intervener, by leave of Court first had and obtained, and asserting his claims and defenses to the Supplemental Complaint filed by Plaintiffs herein, admits, denies and alleges:

1. Intervener is a party to the Settlement Agreement, attached to Plaintiffs' Supplemental Complaint as "Exhibit A," which is by reference incorporated herein, and is the owner of New Income Bonds issued by defendant, Pioche Mines Consolidated, Inc., pursuant to said Settlement Agree-

ment; that in addition to other New Income Bonds issued to him in payment for cash advanced by him to said defendant, a portion of said New Income Bonds so issued, to wit, New Income Bonds of the face value of $25,000.00, were issued to Intervener pursuant to paragraph 1. (A.) (2) (a) of said Settlement Agreement to compensate Intervener for damages incurred by him as a result of the conspiracy of Fidelity-Philadelphia Trust Company, Percy H. Clark and others, which conspiracy had prevented him from performing a contract between him and defendant Pioche Mines Consolidated, Inc. by which he was given the right to sell the treasury stock of said defendant company.

2. The Intervener hereby incorporates by reference and re-alleges, as fully as if herein set forth verbatim, all the admissions, denials and averments made and contained in the Answer to Supplemental Complaint filed herein by defendants and in the said defendants proposed Counterclaims to said Supplemental Complaint.

3. That by reason of the conspiracy between Fidelity-Philadelphia Trust Company and Percy H. Clark and others as in said Answer and in said Counterclaim set forth, Pioche Mines Consolidated, Inc., has been unable to operate its properties nor derive any profit nor earnings therefrom, and for that reason no interest has been earned nor paid on said New Income Bonds, and Intervener is informed and believes, and therefore states, that no such interest or dividends will be earned or paid as long as said conspiracy continues to prevent

Pioche Mines Consolidated, Inc., from operating its said properties.

4. That by reason of said conspiracy, and the acts done pursuant thereto, the interests of Intervener are not protected by plaintiffs, but are violated by plaintiffs, and in order for the interests of intervener to be protected it is necessary that he file this intervention herein.

Wherefore Intervener prays that defendants be granted the relief prayed for in their Answer to Supplemental Complaint and their Counter-claim to Supplemental Complaint, and that plaintiffs recover nothing by their complaint.

Intervener further prays judgment against Fidelity-Philadelphia Trust Company for such damages as they may be found to have sustained by reason of said conspiracy.

Intervener further prays that Fidelity-Philadelphia Trust Company forthwith carry out the terms of the Settlement agreement to be carried out by them.

Intervener further prays for his costs of suit.

/s/ SPRINGMYER & THOMPSON
/s/ BRUCE R. THOMPSON
Attorneys for Intervener

[Endorsed]: Filed June 17, 1948.

[Title of District Court and Cause.]

ORDER GRANTING INTERVENTION

The motion of Richard K. Baker for leave to intervene as a party defendant in this action and to file his Complaint in Intervention attached to his Motion to Intervene this day duly and regularly came on to be heard before court entitled above at Carson City, Nevada; and it appearing to the satisfaction of the court that all interested parties consented to the granting of the intervention, and good cause appearing therefor;

It Hereby Is Ordered that Richard K. Baker be, and he hereby is, permitted to intervene in this action as a party defendant and the clerk of this court hereby is authorized and directed to file the Complaint in Intervention attached to the Motion to Intervene filed by said Richard K. Baker.

It Further Is Ordered that plaintiffs and any defendants who desire to do so may have thirty days from this date in which to serve and file a responsive pleading to said Complaint in Intervention.

It Further Is Ordered that plaintiffs' Motion for Summary Judgment, which is set for hearing before this court on December 15, 16 and 17, 1948, shall be considered as including and reaching the intervener, Richard K. Baker, and his Complaint in Intervention with the same force and effect as if said intervener had been made a party to this action and his Complaint in Intervention had been filed prior to

the serving and filing of plaintiffs' Motion of Summary Judgment.

Done In Open Court this 17th day of June, 1948.

/s/ ROGER T. FOLEY,
District Judge

[Endorsed]: Filed June 24, 1948.

In the District Court of the United States in and for the District of Nevada
No. 101—Civil Action

FIDELITY - PHILADELPHIA TRUST COMPANY, Trustee, and E. CLARENCE MILLER and EDWARD C. DALE,

Plaintiffs,

vs.

PIOCHE MINES CONSOLIDATED, INC., PIOCHE MINES COMPANY and JOHN JANNEY,

Defendants,

RICHARD K. BAKER,

Intervener.

ANSWER TO COMPLAINT IN INTERVENTION

Answer of Fidelity-Philadelphia Trust Company, Trustee, one of the plaintiffs in the above-entitled action (hereinafter called "Plaintiff Fidelity") to the Complaint in Intervention of Richard K. Baker.

For answer to the said Complaint in Intervention, Plaintiff Fidelity says:

FOR A FIRST DEFENSE

1. Plaintiff Fidelity admits that the Intervener, Richard K. Baker, is a party to the Settlement Agreement attached to the Plaintiffs' Supplemental Complaint as Exhibit "A". Plaintiff Fidelity is advised, believes and therefore avers that the Intervener is not the owner of "New Income Bonds" issued by the Defendant, Pioche Mines Consolidated, Inc., pursuant to any provision of said Settlement Agreement, or otherwise, for the reason that, as settlement under said Agreement has not been consummated, the Income Bonds referred to therein have no present status or validity, and that they will not have any status or validity unless and until the said Settlement Agreement has been fully performed by all of the parties thereto in accordance with its terms. If and to the extent that Pioche Mines Consolidated, Inc. has delivered to the Intervener paper purporting to be "New Income Bonds" of the Defendant, Pioche Mines Consolidated, Inc., Plaintiff Fidelity alleges that it has no knowledge or information as to the alleged principal amount of said proposed "New Income Bonds" which may have been issued or delivered to the Intervener. Plaintiff Fidelity denies each and every averment of paragraph 1 of the Complaint in Intervention alleging conspiracy between Plaintiff Fidelity, Percy H. Clark and others. Plaintiff Fidelity has no knowledge of the existence of any contract between the Intervener and the Defendant, Pioche Mines Consolidated, Inc., by which the Intervener alleges he was given the right to sell the Treasury

Stock of the said Defendant Company, if any such contract exists.

2. Insofar as the Intervener attempts in paragraph 2 to incorporate by reference in his Complaint in Intervention and adopt as his own all of the averments contained in the proposed Counterclaim which defendants have asked leave to file, Plaintiff Fidelity is advised by counsel, believes and therefore avers that such averments have no relevancy to any issue requiring answer by Plaintiff Fidelity to the Complaint in Intervention of Richard K. Baker (not one of the defendants), and also require no answer herein because the averments in said proposed Counterclaim are not supported by any fact admitted to the record in this cause.

Insofar as the Intervener attempts to incorporate by reference in the Complaint in Intervention and adopt as his own all of the admissions, denials and averments made and contained by way of defense in the Answer of the defendants (of which the Intervener is not one) to the Supplemental Complaint, Plaintiff Fidelity is advised by counsel, believes and therefore avers that such admissions, denials and averments are not relevant or pertinent averments in the Complaint in Intervention of Richard K. Baker. Nevertheless, and further answering, Plaintiff Fidelity denies each and every one of said averments to the effect and tenor that Plaintiff Fidelity has conspired with Percy H. Clark and others; that Plaintiff Fidelity has not acted in good faith; that it has acted with fraudulent or improper motives; or that it has failed to

perform in any respect its duties and obligations as Trustee for all of the owners and holders of Pioche Debentures issued under the Trust Agreement of January 2, 1929, the Trust Agreement of October 1, 1930 and Supplements thereto, and as Depositary under the Pioche Debenture Holders Agreement dated as of February 1, 1939, a copy of which Debenture Holders Agreement is attached to the original Complaint and marked Exhibit "J". Further answering, Plaintiff Fidelity hereby incorporates by reference herein, and realleges as fully as if herein set forth verbatim, the averments contained in the Affidavits of Miles S. Altemose, a Vice-President of Plaintiff Fidelity, and of Percy H. Clark, heretofore filed of record by Plaintiff Fidelity in this cause in support of Plaintiff's Motion for Summary Judgment, and also the averments contained in the Affidavits of the said Miles S. Altemose and of Thomas B. K. Ringe, Esquire, attorney for Plaintiff Fidelity, heretofore filed in this cause by Plaintiff Fidelity contra the Motion of Defendants for an Order for Deposit in Court.

3. Plaintiff Fidelity has no recent information on which to base knowledge of the operations, earnings and financial status of the Defendants, Pioche Mines Consolidated, Inc. Plaintiff Fidelity denies that a conspiracy has existed at any time between it, Percy H. Clark and others, and avers that no act or failure to act on its part in accordance with its proper duties as Trustee and Depositary is responsible in any way for the inability of the Defendant, Pioche Mines Consolidated, Inc., to operate

its properties and to earn income or profit therefrom, if such is the fact. On the contrary, Plaintiff Fidelity is advised, believes and therefore avers that any such failure on the part of the Defendant, Pioche Mines Consolidated, Inc., may be attributed to the failure or unwillingness of the Defendants to perform the respective obligations assumed by them under the Settlement Agreement contemporaneously with the respective obligations assumed by other parties signatory to said Agreement.

4. Plaintiff Fidelity repeats its denial, as above set forth, of the existence of any conspiracy between it, Percy H. Clark and others, and avers that it has taken no action which in any way violates the interests or rights of the Intervener, and further denies that intervention by the said Richard K. Baker as a party adverse to Plaintiff Fidelity is necessary in order to protect his interests.

FOR A SECOND DEFENSE

Further answering the averments in the Complaint in Intervention herein, Plaintiff Fidelity hereby incoporates in this its second defense all of the averments hereinabove set forth under the heading "First Defense", and further avers that:

1. If there had ever at any time been any claim or demand against Plaintiff Fidelity by the Intervener by reason of the averments set forth in the Complaint in Intervention, which Plaintiff Fidelity denies, then said claim is barred by lapse of time, and Plaintiff Fidelity avers that any such claim, if any there be or was, is barred and cannot now be prosecuted, nor can any relief be granted the Inter-

vener as against Plaintiff Fidelity because the Intervener has allowed his alleged claim and the enforcement of his alleged rights to sleep from the date of the execution of the Settlement Agreement in 1942 to the date of the filing of the Intervener's Motion for Leave to Intervene on or about January 21, 1948, and in particular from the date of the filing of the Supplemental Complaint on or about May 16, 1946.

Wherefore, Plaintiff Fidelity prays that the Complaint in Intervention be dismissed, with costs to the Intervener.

THATCHER, WOODBURN & FORMAN,

/s/ By WM. J. FORMAN,

MORGAN, LEWIS & BOCKIUS

/s/ By J. TYSON STOKES,

Attorneys for Plaintiff, Fidelity-Philadelphia Trust Company, Trustee.

[Endorsed]: Filed July 15, 1948.

[Title of District Court and Cause.]

ORDER ON MOTIONS FOR DEPOSIT

Defendants Pioche Mines Consolidated, Inc. and Pioche Mines Company filed on October 23, 1947, separate motions for an order of this Court directing deposit in court by plaintiff Fidelity-Philadelphia Trust Company all of the debentures issued by defendant Pioche Mines Consolidated, Inc. which are now held by plaintiff Fidelity-Philadelphia Trust Company as set forth in the Supplemental

Complaint on file herein together with the authority for holding them.

The Court's conclusions as to the merits of the Motions for Deposit make it unnecessary to decide whether the provisions of Sec. 8748, Nevada Compiled Laws, may be exercised by virtue of Rule 64 or any other of the Federal Rules of Civil Procedure. Whether money or property should be deposited in a Nevada Court under said Sec. 8748 is a matter within the discretion of that Court. If this Court has such discretion in a proper case, the showing here would not support an order for deposit.

Defendants contend that a deposit by Fidelity of the "old debentures" in court will remove the obstacles to the use and enjoyment of the Pioche properties which have been held up by fraud and conspiracy as alleged in the Counterclaim filed with the original Answer. Assuming the Court's power so to do, an order requiring such deposit at this stage of the proceedings would in effect be a decision on important and disputed issues in advance of a hearing.

No showing has been made that the Trustee or Depositary is not responsible. No such contention seems to have been made. United States v. Sterling, 291 F. 695.

An order requiring the deposit here requested would tax the facilities of this Court and impose an undue burden upon the officers of the Court in the custody and management of the subject matter of the deposit.

It Is Ordered that the motions of Pioche Mines

Consolidated, Inc. and Pioche Mines Company for deposit in court are, and each of them is, hereby denied.

Dated: This 26th day of July, 1948.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed July 27th, 1948.

[Title of District Court and Cause.]

ORDER ON MOTION TO BRING IN ADDITIONAL PARTIES

Defendant Pioche Mines Consolidated, Inc. on p. 17 of Brief in Support of Motion for Leave to File Counterclaim, concedes that the filing of the counterclaim would not require for its adjudication the proposed new parties, namely, Percy H. Clark and Albert P. Gerhard as individuals, or in their capacities as representing the majority of the holders of the deposited debenture bonds of the defendant Pioche Mines Consolidated, Inc., and Lewis v. Ingram, 57 F.2d 463, was cited in support of that position.

The Motions to file counterclaim and to add third parties were filed on the same day and treated together in the Reply Briefs of defendants. Therefore, it appears that it is defendants' purpose to bring in the said additional parties in connection with their counterclaim. The presence of said additional parties not being required for the granting of complete relief in the determination of said counterclaim,

It Is Ordered that the Motion of the defendants to bring in said additional parties be, and the same hereby is, denied.

Dated: This 29th day of July, A.D., 1948.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed July 29th, 1948.

[Title of District Court and Cause.]

ORDER ON MOTION FOR LEAVE TO FILE COUNTERCLAIM TO SUPPLEMENTAL COMPLAINT

Defendants Pioche Mines Consolidated, Inc., Pioche Mines Company and John Janney joined in a Motion filed April 21, 1947, for leave to file a counterclaim to the Supplemental Complaint, a copy of said counterclaim being attached to the Motion.

The counterclaim here sought to be filed may be viewed as arising out of the occurrence and surely out of the transaction that is the subject matter of the plaintiffs' claim and does not require for its adjudication the presence of third parties of whom the Court cannot acquire jurisdiction. Lesnik v. Public Industrials Corporation, 144 F.2d 968.

Counsel for plaintiffs at p. 10a of brief, Contra Motion for Leave to File Counterclaim, state:

"While a motion to strike would be the usual way of raising the question of failure to comply with the Rules 8(a), 9(b), and 12(f) [Federal Rules of Civil Procedure], the pleading with which we are now

concerned is not yet a matter of record, and therefore the Court in deciding whether it should allow the proposed counterclaim to be filed may consider these questions relating to the form and sufficiency of the counterclaim at this time in connection with defendants' Motion for leave to file it."

Having determined to permit the filing of the counterclaim, this suggestion will not be followed but if the counterclaim, after having been filed, is subject to motions or other objections founded upon the rules mentioned by plaintiffs, it may be that such objections might be cured by amendments. Refusing to permit the filing of the counterclaim would result in depriving defendants of opportunity to amend if occasion for amendment should arise.

It Is Ordered that Motion for Leave to File Counterclaim to Supplemental Complaint be, and the same hereby is, granted, and that defendants Pioche Mines Consolidated, Inc., Pioche Mines Company and John Janney may file the Counterclaim to Supplemental Complaint, copy of which is attached to defendants' Motion.

It Is Further Ordered that within twenty (20) days after receipt of a copy of this Order plaintiffs serve such motions or responsive pleading as they may be advised to file herein.

Dated: This 28th day of July, A.D., 1948.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed July 29th, 1948.

[Title of District Court and Cause.]

REPLY OF FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE TO COUNTERCLAIMS TO SUPPLEMENTAL COMPLAINT

Now Comes Fidelity-Philadelphia Trust Company, Trustee, one of the plaintiffs in the above-entitled action (hereinafter called "Plaintiff Fidelity") and replying to the Counterclaims to Supplemental Complaint (hereinafter called the "Counterclaim") admits, denies and avers as follows:

REPLY TO FIRST CAUSE OF ACTION

1. Plaintiff Fidelty is advised by counsel, believes and therefore avers that many of the averments contained in the Counterclaim are irrelevant and immaterial to the issues in this case, relate to persons who are not parties, and contravene in numerous respects Rules 8, 9 and 10 of the Federal Rules of Civil Procedure relating to the form and sufficiency of pleadings. Plaintiff Fidelity, instead of filing a Motion to Strike the aforesaid averments of the Counterclaim, nevertheless files this its Reply to the Counterclaim on its merits, so that the case will be at issue and so that, without further delay, the court may conclusively determine and adjudicate the issues in dispute between the parties hereto.

Replying to the averments in the introductory paragraph of Paragraph 1 of the First Cause of Action of the Counterclaim, Plaintiff Fidelity is advised by counsel, believes and therefore avers that

it is not required to answer the allegations contained in Paragraphs 18 to 33, inclusive, of the Amended Answer of the defendants to the original Complaint, which allegations defendants attempt to incorporate in their Counterclaim by reference, for the reasons (1) that said allegations relate to persons and the actions of persons who are either not parties to this litigation or are persons other than Plaintiff Fidelity, and (2) that the said allegations are no longer relevant to the issues in this case because of the execution of the Settlement Agreement of 1942, which occurred subsequent to the actions complained of in said Paragraphs 18 to 33 of the Amended Answer. Further replying, however, Plaintiff Fidelity denies each and every one of said allegations, insofar as by implication or otherwise it is averred that Plaintiff Fidelity either improperly acted or improperly collaborated with any of the individuals referred to in said allegations. Plaintiff Fidelity denies that it "well knew" that the original Complaint contained statements that were false and defamatory. Plaintiff Fidelity further denies that it had any knowledge of the actions of said individuals complained of prior to the execution of the said Settlement Agreement, except insofare as Plaintiff Fidelity, as Trustee, received instructions from the Debenture Holders Committee to declare a default and to institute suit, as Trustee, received instructions from the Debenture Holders Committee to declare a default and to institute suit, as Trustee, under trust agreements referred to in the original Complaint.

Further replying, Plaintiff Fidelity denies the allegations contained in Paragraph 16 of defendants' Answer to Supplemental Complaint, which allegations defendants attempt to incorporate by reference in the Counterclaim, and avers that at no time has it breached the said Settlement Agreement, or failed, neglected or refused to cooperate with the defendant company, for the reasons more fully set forth in this Reply to the Counterclaim.

Further replying to each of the sub-paragraphs of Paragraph 1 of the First Cause of Action set forth in the Counterclaim:

(a) to (f) inclusive. Plaintiff Fidelity is advised by counsel, believes and therefore avers that the allegations contained in sub-paragraphs (a) through (f) of said Paragraph I relate, except for a single reference in sub-paragraph (d), to persons and the actions of persons who are not parties to this litigation, and that therefore said allegations, with the exception mentioned, require no answer on the part of Plaintiff Fidelity. With respect to said sub-paragraph (d), Plaintiff Fidelity denies that through any wrongful act or omission on its part the consents of holders of undeposited debentures to the Settlement Agreement were not forthcoming, or that the status of said consents was rendered uncertain, or that the Stockholders' Meeting was caused to be adjourned.

(g) Plaintiff Fidelity denies that the approval or disapproval of the form of the Income Bond was the result of any wrongful act or omission upon the part of Plaintiff Fidelity. It is admitted that, when

the form of the new Income Bond was submitted to one of its officers by Percy H. Clark, Chairman of the Debenture Holders Committee, Plaintiff Fidelity, acting through one of its Vice-Presidents, M. S. Altemose, who is in charge of Plaintiff Fidelity's Corporate Trust Department, raised the question, as the result of his long experience with corporate securities, as to whether the form of said Income Bond complied with the requirements of the Trust Indenture Act of 1939, and also the question as to whether the issuance of the Income Bonds might not require compliance with the Securities Act of 1933. Plaintiff Fidelity avers, however, that its question as to the form of the Income Bond and compliance with the Securities Act of 1933 was raised in a preliminary way and in due course in order to be certain that, by participating as Trustee and Depositary in the issuance and exchange of the new Income Bonds, it would not be held to be in violation of Federal law and subject to the serious penalties provided in the Trust Indenture Act of 1939 and the Securities Act of 1933. Plaintiff Fidelity thereupon, in accordance with its usual procedure in such matters, asked its General Counsel, Messrs. Morgan, Lewis & Bockius, for an opinion with respect to the questions raised as aforesaid. Plaintiff Fidelity further avers that, since May of 1944, its said General Counsel, Messrs. Morgan, Lewis & Bockius, have advised it in connection with all matters relating to its obligations as Trustee and Depositary and also in connection with this litigation.

(h) Plaintiff Fidelity denies that it wrongfully delayed or obstructed the making or consummation of the Settlement Agreement through communication with the Securities and Exchange Commission or otherwise. It is admited that performance of the Settlement Agreement may have been delayed by reason of the request to secure a clearance from the Securities and Exchange Commission, but it is denied that such action was taken to obstruct the performance of said Agreement. Plaintiff Fidelity further denies that it filed or caused to be filed with the Securities and Exchange Commission any legal objections to the issuance of the new securities.

(i) Plaintiff Fidelity denies that it caused its officers and attorneys to "work with said Debenture-holders' Committee and said Clark" in a joint effort to prevent, obstruct and delay consummation of the Settlement Agreement. Plaintiff Fidelity further avers that it had every interest, as Trustee and Depositary, to see to it that the Settlement Agreement should be carried out and that the litigation and disputes between the parties in interest should be settled at the earliest possible date, so that Plaintiff Fidelity, which has no beneficial ownership interest (other than as Trustee) in any of the assets, properties or securities of Pioche Mines Consolidated, Inc., or Pioche Mines Company, might be discharged of its obligations as Trustee and Depositary. Plaintiff Fidelity further avers that it cooperated in every proper and reasonable way with the interested parties in an effort to effect a proper consummation of the Settlement Agreement.

2. Replying to the averments of Paragraph 2 of the First Cause of Action of the Counterclaim, Plaintiff Fidelity denies that it has in any respect failed, refused or neglected to perform terms of the Settlement Agreement on its part to be performed, and this for the reason, among others, that it is not a party to said Agreement, either on its capacity as Trustee or in its capacity as Depositary. Further replying to each of the sub-paragraphs of Paragraph 2 of the First Cause of Action of the Counterclaim:

(a) Plaintiff Fidelity denies that it refused or delayed to make a definite and proper reply to a request to supply to the Stockholders' Meeting a list of debenture holders represented by it who were committed to the Settlement Agreement. Plaintiff Fidelity further avers that its position as Trustee and Depositary in connection with the exchange of the securities contemplated by the Settlement Agreement was made clear to the defendants in numerous letters written by Plaintiff Fidelity during the latter part of 1943, and in particular in letters dated November 13, 1943 and November 22, 1943, respectively, attached as Exhibits "F-1" and "F-3" to the affidavit of M. S. Altemose heretofore filed in these proceedings contra defendants' Motion for Deposit in Court.

(b) Plaintiff Fidelity denies that through any communication or otherwise it gave cause to confuse those in attendance at the Stockholders' Meeting as to the status of debenture holders who had deposited their bonds with it. Plaintiff Fidelity ad-

mits that it sent a list of debenture holders to the Stockholders' Meeting, and that said list was accompanied by a copy of a letter of instructions received by Plaintiff Fidelity from the Debenture Holders Committee for which Plaintiff Fidelity, as Depositary, was acting as the agent, but Plaintiff Fidelity avers that there was no reason why the stockholders should have been confused by the list and copy of letter transmitted as aforesaid.

(c) Plaintiff Fidelity denies that it refused to proceed with the Settlement Agreement unless and until the payment of $7500 was first made to it in cash. In this connection Plaintiff Fidelity avers that it asked to be reimbursed in the amount of $7500 for services rendered by it as Trustee over a period of years prior to 1943, as a reasonable and proper fee for the services so rendered. Plaintiff Fidelity further avers that it later expressed through its General Counsel a willingness to reconsider the matter of its fee for services as Trustee, if such reconsideration would expedite settlement under the Settlement Agreement.

(d) Plaintiff Fidelity denies that it improperly refused to affix issuance stamps required by the law to be affixed to the securities to be delivered to depositing debenture holders, or that it improperly refused to accept the guarantee of payment for such stamps by the Bank of Pioche. Plaintiff Fidelity further avers that pursuant to the usual practice of those acting in a similar capacity, it requested cash to cover the cost of affixing the issuance stamps, for the reason that it was under no obligation to ad-

vance the amount required to purchase such stamps or to accept the guarantee of a bank unknown to it, viz., Bank of Pioche.

(e) Plaintiff Fidelity denies that it improperly refused to acknowledge an obligation to distribute new securities sent to the Pioche Mines Consolidated, Inc. and to tender the same to debenture holders in exchange for old debentures and report the result of such tender. Plaintiff Fidelity admits that it did not distribute the new securities received by it from Pioche Mines Consolidated, Inc. and that it did not tender the same to debenture holders in exchange for old debentures, for the reason that as Depositary it could not do so in the absence of the receipt of authority so to do from its principal, the Debenture Holders Committee.

(f) Plaintiff Fidelity denies that it or anyone acting on its behalf attempted to persuade the Securities and Exchange Commission or the eastern attorneys of Pioche Mines Consolidated, Inc. that the issuance of the new securities would be in violation of the Trust Indenture Act or any other law. For a more detailed reply in respect of this point Plaintiff Fidelity refers to and incorporates herein the averments of sub-paragraphs (g) and (h) of Paragraph 1 hereof, ante.

(g) Plaintiff Fidelity denies that it has continued improperly to hold up the distribution of new securities after the Legal Department of the Securities and Exchange Commission gave an opinion that the issue of the new securities was legal. Plaintiff Fidelity avers that it has not distributed new securities

to the Debenture Holders after receipt of copy of an opinion letter written by the Legal Department of the Securities and Exchange Commission, for the reason that it has received no authority to make such distribution from its principal, the Debenture Holders Committee.

(h) Plaintiff Fidelity denies that any wrongful act or omission on its part created an impasse in the progress of the Settlement Agreement; denies that it worked with Debenture Holders Committee in actions which were intended to create an impasse or to create a cloud upon the preference feature of the Preference Notes; and denies making threats of any kind.

(i) Plaintiff Fidelity denies that by communication or otherwise it has attempted to complicate and delay consummation of the Settlement Agreement or that it has caused Pioche Mines Consolidated, Inc. to become financially embarrassed. Plaintiff Fidelity avers that on the contrary it has undertaken to cooperate in every appropriate and reasonable way with the interested parties for the purpose of properly effectuating the Settlement Agreement and terminating the litigation and disputes between the parties.

REPLY TO SECOND CAUSE OF ACTION

1. Plaintiff Fidelity reasserts all of the allegations and denials contained in its Reply to the First Cause of Action of the Counterclaim, and in particular and without meaning to limit the generality of the foregoing, Plaintiff Fidelity reasserts all the allegations and denials in its Reply to the First

Cause of Action relating to allegations contained in certain numbered paragraphs in the Amended Answer to the original Complaint which defendants have attempted to incorporate in the Counterclaim by reference.

2. Plaintiff Fidelity reasserts all of the allegations and denials contained in the Reply to the First Cause of Action of the Counterclaim relating to Paragraph 16 of the defendants' Answer to Supplemental Complaint. With respect to Paragraph 14 of the Answer to Supplemental Complaint, Plaintiff Fidelity denies the allegations therein charging it with misrepresentations in bad faith, with wrongfully inducing the defendants to merge their respective properties, and with intending to force the defendants or others into a disadvantageous position.

3. Plaintiff Fidelity denies that it connived or conspired with any one for the purpose of preventing consummation of the reorganization plan provided for in the Settlement Agreement, as alleged in Paragraph 3 of the Second Cause of Action of the Counterclaim. On the contrary Plaintiff Fidelity again avers that it has at all times endeavored to cooperate with the interested parties in properly carrying out the terms of the Settlement Agreement and in terminating the litigation and disputes between the parties.

4. Plaintiff Fidelity denies the existence of any scheme or conspiracy, as alleged in Paragraph 4 of the Second Cause of Action of the Counterclaim, and denies that pursuant to said alleged scheme or conspiracy Plaintiff Fidelity either alone or with

others attempted in any way either to interfere with the refinancing of the defendant Company or to acquire properties belonging to the defendants.

5. Plaintiff Fidelity denies the existence of said conspiracy at any time and therefore denies its existence at the particular times alleged in Paragraph 5 of the Second Cause of Action of the Counterclaim. While acknowledging that Percy H. Clark was attorney for Plaintiff Fidelity in the institution of the action against defendants by Plaintiff Fidelity, and that said Percy H. Clark is still of record as one of the attorneys for Plaintiff Fidelity in said proceedings, Plaintiff Fidelity avers that since May of 1944 it has been advised by its General Counsel, Messrs. Morgan, Lewis & Bockius, on all legal matters incident to this litigation. Plaintiff Fidelity admits that, as alleged in the subject paragraph of the Counterclaim, Percy H. Clark is attorney for the Debenture Holders Committee, that he is an individual member thereof and is individually a party to the Settlement Agreement. Plaintiff Fidelity is advised by counsel, believes and therefore avers that it is not required to answer the allegations in the subject paragraph of the Counterclaim relating to actions of Percy H. Clark in various capacities other than as attorney for Plaintiff Fidelity, for the reason that said Percy H. Clark is not a party to this litigation.

6. Plaintiff Fidelity denies that, as alleged in Paragraph 6 of the Second Cause of Action of the Counterclaim, it induced defendants to enter into the Settlement Agreement or that it made any false

or fraudulent representations with respect thereto, but on the contrary avers that the negotiations leading to the execution of said Agreement were conducted by representatives of the defendants and by John Janney on the one hand, and by the Debenture Holders Committee on the other hand. Plaintiff Fidelity further reasserts its allegation that it is not a party to said Settlement Agreement, and for that reason, among others, denies that it entered or could have entered into the same in bad faith, and further denies that any of its actions were taken in bad faith or with an improper motive and intent, Plaintiff Fidelity's sole motive and intent being to perform its duties and obligations as Trustee and Depositary.

7. Plaintiff Fidelity denies, in reply to Paragraph 7 of the Second Cause of Action of the Counterclaim, either that it participated in any conspiracy or that it contrived either alone or with others to use the Settlement Agreement as a means of getting non-depositing debentures to combine with other debentures for the purpose of arriving at terms of agreement more harsh than or different from those included in the Settlement Agreement. Plaintiff Fidelity further avers that while, as stated heretofore, it is not a party to the Settlement Agreement, it has at all times endeavored to cooperate with the interested parties in properly effectuating a consummation thereof.

8. Plaintiff Fidelity denies any participation on its part in a conspiracy, as alleged in Paragraph 8 of the Second Cause of Action of the Counterclaim,

to coerce Pioche Mines Consolidated, Inc. into leasing its properties, including the properties of Pioche Mines Company and Nevada Volcano Mines Company, or to place the defendant company or its creditors in any improper or disadvantageous position, or to cause property to be held in idleness at any time.

9. Plaintiff Fidelity is unable to admit or deny certain allegations contained in Paragraph 9 of the Second Cause of Action of the Counterclaim, for the reason that it has no knowledge as to what operations the defendants have or have not carried on or could or could not have carried on in connection with the mining properties since the date of the execution of the Settlement Agreement. While admitting that the market value of lead, zinc and copper has been at a high level in recent years and that in certain instances the United States government has granted subsidies and allowances for the purpose of developing ore bodies containing lead, zinc and copper, Plaintiff Fidelity denies the relevancy of defendants' allegations in this respect, for the reason among others that there is no allegation that the properties in question contain deposits of these ores or that the United States government would have extended its aid in the development of any of the properties or any ore bodies which might be found therein.

10. Plaintiff Fidelity denies that, as alleged in Paragraph 10 of the Second Cause of Action of the Counterclaim, it failed and refused to distribute the new securities to those entitled thereto, that it failed

and refused to complete the Settlement Agreement, that through any improper action on its part it raised doubts as to the preference feature of the Preference Notes, and that it acted pursuant to a conspiracy.

11. Plaintiff Fidelity denies the allegations of Paragraph 11 of the Second Cause of Action of the Counterclaim insofar as any act or omission of Plaintiff Fidelity is alleged to be the reason for the failure of the defendants to produce metals which may be contained within the properties of Pioche Mines Consolidated, Inc. or Pioche Mines Company.

12. Plaintiff Fidelity denies the allegations of Paragraph 12 of the Second Cause of Action of the Counterclaim insofar as any act or omission of Plaintiff Fidelity is claimed to be the reason for Nevada Volcano Company having been allegedly deprived of properties, rights and benefits and prevented from producing metals.

13. Plaintiff Fidelity denies, in reply to the allegations of Paragraph 13 of the Second Cause of Action of the Counterclaim, that it has committed any wrongful act, that it is or has been engaged in any conspiracy, and that, as the result of any action or conduct on its part, the defendants have been damaged to the extent of $3,000,000, or any other sum.

14. Plaintiff Fidelity is advised by counsel, believes and therefore avers that it is not required to answer the allegations contained in Paragraph 14 of the Second Cause of Action of the Counterclaim.

Wherefore, Plaintiff Fidelity prays that the

Counterclaim be dismissed and that plaintiffs recover their costs incurred and to be incurred.

THATCHER, WOODBURN & FORMAN

/s/ By WM. K. WOODBURN

MORGAN, LEWIS & BOCKIUS

/s/ By THOMAS B. K. RINGE

Attorneys for Fidelity-Philadelphia Trust Company—Trustee

[Endorsed]: Filed Sept. 14, 1948.

[Title of District Court and Cause]

AFFIDAVIT OF JOHN JANNEY IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF MOTION FOR LEAVE TO CROSS EXAMINE PARTY MAKING AFFIDAVIT

State of Utah,
County of Salt Lake—ss.

John Janney, being first duly sworn, on oath deposes and says:

That he is the John Janney named as a defendant in the above entitled action; that he is also an officer, to-wit, a director of and president of Pioche Mines Consolidated, Inc.; that he is also an officer, to-wit, a director of and president of Pioche Mines Company.

That he has been such officer of each of said companies throughout the period starting with the organization of Pioche Mines Consolidated, Inc. and

the issuance of the debentures as set forth in the original answer and the amended answer on file herein, up to the present time.

During all of that period he has been and served as, general manager of each of said corporations, and has personally supervised their corporate affairs, with the advice, approval and direction of the respective boards of directors and stockholders, and is familiar with all of the facts relating to the issue of debentures, and their payment, and the issues which have arisen in connection therewith and are the subject of this action.

That the real issue between the parties has never been the payment or non-payment of the debentures as set forth in the complaint. The real issue has been whether or not said debentures were issued as a part of a conspiracy to hold in idleness an extensive mineral area, potentially one of the most important in the United States, as is more particularly set forth in the answer and counterclaim, and the amended answer and counterclaim on file in this action.

All of the parties to the Settlement Agreement except the debenture holders entered into it in good faith and in the belief that it would be promptly performed and the properties of Pioche Mines Consolidated, Inc. could be promptly developed and operated, free from the threat of the debenture holders, and to that end were even willing to dismiss the counterclaim against Fidelity-Philadelphia Trust Company.

The issue now between the parties is not that

Fidelity-Philadelphia Trust Company wants the settlement agreement performed as written. The real issue, since the filing of the Supplemental Complaint and the answer thereto and the counterclaim is whether or not Fidelity-Philadelphia Trust Company, and the debenture holders have obstructed the performance of the Settlement Agreement for the purpose of continuing the same conspiracy as alleged in the original and amended answers and counterclaims.

That as is set forth in said counterclaim, the said Percy H. Clark used his position with Pioche Mines Consolidated, Inc., said debentures, and the expenditure of the proceeds therefrom to prevent Pioche Mines Consolidated, Inc. from financing to pay off and discharge said debentures and developing and operating its properties.

That affiant was present in Philadelphia in June of 1942 when the deposition of Percy H. Clark was being taken, as referred to in "Exhibit One" attached to the Answer to the Supplemental Complaint on file herein. At that time said Percy H. Clark became embarrassed and upset and begged for a settlement conference while in the midst of his cross examination. The Settlement Agreement, which among other things, provided for the discharge of interest bearing debentures of a principal amount of $602,050 then claimed due by the issuance of new 30 year income bonds which bore no interest unless earned, resulted from the proposal and request of said Percy H. Clark made while his deposi-

tions were being taken and not as set forth in affidavit of said Clark.

That the activities and the practices of said Percy H. Clark theretofore had been such that all of the parties to the settlement agreement except the debenture holders would have refused to even consider any form of agreement unless and until the debenture holders were first bound to a definite plan of settlement without the necessity of further negotiation and conferences, the remaining parties being privileged to either accept or reject the proposal as offered by the debenture holders and that a clear statement to this effect was the answer of defendants to said proposal of said Clark and that the statement made in depositions of said Clark in this matter is untrue, inaccurate and misleading.

Another example of such partially true statements of defendant Clark which are calculated to deceive the court is that statement which appears on page 25, lines 19-27:

> "XV. That the facts set forth in Article XV are true and deponent alleges the facts requested by Hartshorn & Walter were furnished to that firm to the full extent of deponent's knowledge, as more particularly set forth in the following letters attached hereto as Exhibit 18, to-wit:
>
> Aug. 12, 1943 from Hartshorn & Walter to Committee. Aug. 27, 1943 from Committee to Hartshorn & Walter. Jan. 18, 1944 from Committee to Hartshorn & Walter."

The complete truth is that a number of other letters were addressed to Percy H. Clark and copies thereof are attached to the affidavits of John Janney, Richard K. Baker and E. G. Woods requesting information, to which letters either no answer was given, or the answer given was evasive and unsatisfactory and calculated to delay or mislead auditors Hartshorn & Walter and also the stockholders of the companies who had met to approve or disapprove the merger of the three corporations and the result was that Hartshorn & Walter never made an Auditors' Report to the stockholders' meeting setting forth the debentures remaining, outstanding after voting the merger and stockholders' meeting acted on the correspondence with Clark set forth in affidavits filed in this case, and not on an Auditors' Report.

Another example of a partially true statement which is calculated to deceive the court is that appearing on page 9, line 20-24:

> "Negotiations continued until the spring of 1942 when a stalemate was reached and negotiations discontinued. The Smelting Company indicated it would be glad to reopen negotiations as soon as those interested in the Pioche properties settled their differences."

This statement is calculated to impress the court with a false conception as to a proposed long-term lease of the properties of defendant company. The fact is that no one has ever opposed such a lease and the defendants have expressed to Mr. Clark and

the others engaged in negotiating the settlement that the long continued smear campaign carried on by plaintiffs against the defendant company had caused defendants to believe that any further financing of company operations would be impracticable and that for such reason defendants were unwilling to undertake any further financing of the company. Therefore a long term lease is left as the only way open to operate the property of defendant company.

That the position of defendants with reference to such lease is clearly set forth in letters which are to be found in deponent Clark's files and it is that negotiations must be competitive and they must be fairly in the interest of defendant company which would be the only true statement of defendants' position in relation to a long term lease.

That further it should be noted the absence of any reference to a lease in the original draft of settlement attached to Clark's affidavit. That deponent Clark knows that at the time of the final draft of the settlement he abruptly announced that a lease had to be made with a particular company, to-wit, The United States Smelting Company, which proposal was refused by defendants. This was made clear in writing in a letter to Mr. Clark signed by a member of the Dwight law firm, attorneys for defendants.

That the statement of Mr. Clark in his deposition could only be intended to confuse and mislead the court and divert attention away from the real issues. That deponent Clark is also aware that the United States Smelting Company on several occasions has

refused to negotiate a lease while litigation is pending and his premature insistence on such a lease is merely another way to hold the properties in continued inactivity, except insofar as it may be the means to coerce defendants into making a lease with parties of his own choosing and otherwise further the aims of the conspiracy.

Another example of partially-true statements which are calculated to deceive the court is that appearing on page 16, lines 14-16; and that appearing on page 17, lines 2-8:

> "Deponent in accordance with instructions received from the Committee immediately prepared a form of assent to be signed by the debenture-holders."
>
> "Mr. John T. Thatcher stayed over in Pioche until the 19th, when he was joined by his father, Mr. George B. Thatcher, but they were not permitted to vote on that day. As they could stay no longer they left proxies with Mr. Ford, an employee of Pioche Consolidated, with instructions to vote these shares in favor of the merger and consolidation but not for anything else."

The true facts are: That the assents which had been prepared, and signed, were disclosed at the Stockholders' Meeting to be "conditional" and qualified, to the extent that each of the signers thereof could have repudiated his consent with the connivance of Percy H. Clark AFTER the merger was voted; therefore, they were not assents to the settlement as provided for in the Settlement Agree-

ment. Acting on the beleif by the stockholders' meeting that the consent may not have been intended to be conditional, Mr. Thatcher was asked if he would, on behalf of the Debenture Holders Committee, guarantee that the signers of the assents would perform the settlement agreement as written, whereupon Mr. Thatcher refused to so guarantee and the stockholders refused to vote the merger until they could receive assurance as to what amount of debentures were bound to accept new securities as provided in the settlement agreement and what amount of debentures were not committed to the settlement agreement and would remain as cash obligations of the merged company.

Clark's committee evaded, confused and avoided furnishing this information until December 3, 1943. It is not true to say that Mr. Thatcher was not permitted to vote. He was allowed to vote on all matters submitted for vote as long as he remained at the meeting.

That it would appear that to require defendants to produce evidence to contradict such palpably incorrect and loosely contrived statements is an unjust imposition on all the other parties concerned when the cross examination of Mr. Clark would divulge the true facts.

Affiant has carefully read the "Affidavit of Percy H. Clark to be Filed in the Above Entitled Suit with Motion for Summary Judgment" and states that said affidavit is replete with many other partially true and incomplete statements of fact, and

hearsay statements, calculated to impress this court with their sincerity and apparent completeness, but which in truth and in fact, are of a class which would constitute a contempt of the dignity and respect for the process of law, and designed to cause this court, in ruling on the Motion for Summary Judgment, to believe the true facts and true issues to be other than they are or else to put defendants to unreasonable expense and cause unnecessary delay in gathering testimony to refute and clear up the statements in said affidavit which being made under oath should never be allowed to consume the time of the court to refute unless made in good faith and within the knowledge of affiant.

That to controvert said affidavit completely in all respects wherein it is false or misleading or where genuine issues of fact exist, and to supplement it completely with the true facts wherein it is incomplete and calculated to mislead, would delay the final result of this litigation and would continue the properties being tied up in idleness, would require the testimony of many witnesses in many places throughout the United States and would require the expenditures of funds which Pioche Mines Consolidated, Inc., does not have and under its present financial structure can not obtain within the limits set out in the Settlement Agreement.

That the affidavit of Percy H. Clark also requires an answer to statements made with deliberate intent and full knowledge on the part of said Clark that said statements conceal in part facts which if fully

stated would give to the court an entirely different impression of the facts being dealt with in said affidavit and therefore the cross examination of Mr. Clark in the presence of the court could be made to reveal all the evidence necessary to refute statements that would otherwise require the excessive labor and expense and delay above indicated.

That since this situation is one created by plaintiffs and by Percy H. Clark, the attorney for plaintiffs, the chairman for the Debenture Holders Committee, as well as their attorney, it would appear appropriate and proper that plaintiff Fidelity-Philadelphia Trust Company should be directed to produce said Percy H. Clark to appear before this court to sustain the statements which plaintiffs have submitted with intent to influence the determinations of the court and that he should be subjected to cross examination as to the matters set forth in said affidavit.

/s/ JOHN JANNEY

Subscribed and sworn to before me this 10th day of February, 1949.

[Seal] /s/ CLAUDIA H. SMITH,
Notary Public for Utah, Residing in Salt Lake City.

My Commission expires June 7, 1952.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 14, 1949.

[Title of District Court and Cause]

MOTION FOR PAYMENT OF EXPENSES AND ATTORNEY FEES UNDER RULE 56g

Defendant, Pioche Mines Consolidated, Inc., represents to the Court that the affidavits presented by plaintiff, Fidelity-Philadelphia Trust Company, on its Motion for Summary Judgment were presented in bad faith and solely for the purpose of delay, as more particularly appears from the said affidavits, and will appear from the affidavits of Francis G. Shaw, T. Mitchell Hastings, Richard K. Baker and John Janney already on file herein, and from the affidavits hereafter to be filed, and other showing to be made, at the hearing of this motion, and this defendant, Pioche Mines Consolidated, Inc., moves the Court for an order requiring plaintiff, Fidelity-Philadelphia Trust Company to pay this defendant the reasonable expenses which the filing of said plaintiffs' affidavit have caused this defendant to incur, together with a reasonable attorney fee, as is set out in the affidavit of Francis T. Cornish, hereto attached.

This defendant further moves that Fidelity-Philadelphia Trust Company, Miles S. Altemose and Percy H. Clark be adjudged guilty of contempt for filing said affidavits.

/s/ FRANCIS T. CORNISH
Attorney for Defendant, Pioche Mines Consolidated, Inc.

AFFIDAVIT IN SUPPORT OF MOTION UNDER RULE 56g

State of Nevada,
County of Lincoln—ss.

Francis T. Cornish, being first duly sworn, deposes and says: That he is an attorney at law, licensed to practice in the highest courts of the State of California, and licensed to practice in the United States District Court for the District of Nevada, and has his offices at 2140 Shattuck Avenue, City of Berkeley, County of Alameda, State of California.

Affiant is one of the attorneys of record for defendant, Pioche Mines Consolidated herein, and as such attorney has assumed since October 1947 the active conduct of the defense of Pioche Mines Consolidated in this action, and the prosecution of its counterclaim on file herein; that as such attorney affiant has actively conducted the opposition to the motion filed by plaintiff for a summary judgment herein.

That in opposing said motion, it has been necessary for affiant to correspond from Berkeley with John Janney, as President of Pioche Mines Consolidated in Pioche, and with intervenor Richard K. Baker in Denver, Colorado, and to confer with said Richard K. Baker in Denver, Colorado, Salt Lake City, Utah, Pioche, Nevada and Reno, Nevada, and to expend time in legal and factual research and incur expense in traveling, in postage and in telephone calls.

That affiant, John Janney and Richard K. Baker first conferred regarding the motion for summary judgment and supporting affidavits for three days at Reno, Nevada in June of 1948, and after so conferring concluded that said affidavits were replete with false statements and false representations and false presentations of fact, and affiant was requested to advise his client as to the proper method to present a defense to said motion in such a manner that after hearing the matter the court would be fully advised of the true facts, and, basing his judgment upon the true facts could properly and intelligently determine the issues before him.

From June 1948 until December 1948, on occasions when affiant was in Denver, Colorado on related business, affiant conferred with Richard K. Baker from time to time, and during that period corresponded also with said Baker and corresponded with John Janney, and in December 1948, and again in January 1949, made trips to Pioche, Nevada, where the records of Pioche Mines Consolidated are kept, and there conferred with John Janney, and in so conferring advised concerning the possibility of depositions and affidavits to oppose and contradict the false statements, representations and presentations, and was advised that the Settlement Agreement and the extent to which it had been performed by Pioche Mines Consolidated left that company with no means of raising the money with which to pay the expense of affidavits and depositions.

Affiant, said Baker and said Janney met in Salt

Lake City in February, 1949 and conferred regarding the motions and the proper means to present the facts of the case, and determined that in view of the financial limitations placed upon Pioche Mines Consolidated by the Settlement Agreement the most available defense was considered to ask that Percy H. Clark, attorney of record for plaintiff who verified the original complaint in Washoe County, Nevada, and filed one of the affidavits complained of in support of motion for summary judgment, himself appear in court and be cross-examined so he could be forced with his own lips and at his own expense to answer under oath in full as to his false statements, his misleading statements, and the facts omitted by him which if stated in full would have precluded the court from deriving false conclusions from the affidavit filed. Accordingly, after returning from Salt Lake City affiant prepared and forwarded to Wm. J. Forman, attorney for plaintiffs, a stipulation that Percy H. Clark would appear at the scheduled hearing of the motion for summary judgment on February 23, 1949, which stipulation was not agreed to.

Affiant then prepared, served and filed a motion for an order directing the plaintiffs to produce their attorney of record, Percy H. Clark, for cross-examination at the hearing and then received a telephone call from Wm. J. Forman and was requested to stipulate that both motions be continued because of the illness of Philadelphia attorneys, and affiant consented to the request provided the Court's calendar would permit the hearing of affiant's motion

sufficiently in advance so that if denied, affiant could still prepare for the motion for Summary Judgment. This stipulation was made and affiant's motion was heard and determined on April 8, 1949.

The reason for urging the motion was that affiant was sufficiently informed of the nature of the case that affiant verily believed that the motion for summary judgment was not made in good faith, and the supporting affidavits were not made in good faith, and to establish this, and the true facts, would require either the deposition of Percy H. Clark, the expense of which the Settlement Agreement would not permit Pioche Mines Consolidated to defray, or at least a month of the entire time of John Janney and affiant, and a part of the time of Richard K. Baker to prepare affidavits, interrogatories under Rule 33 and requests for admissions under Rule 36, and that the work of preparing these documents would have to be done where the original records were available, in Pioche, Nevada, and required a complete review of over 20 years of records of the company.

Affiant accordingly spent the time from April 8, 1949 until May 4, 1949, putting his own personal affairs and practice in shape and arranging for other attorneys to handle matters already calendared for May which could not be postponed and arranging to postpone others, and has spent his entire time from May 4, 1949 until the date of this affidavit in reviewing documents and preparing other documents in order to present the true facts to the court on May 31, 1949, and verily believes

that he will be necessarily required to spend the time intervening between making this affidavit and May 31, 1949 in the same work.

That affiant has expended in all a total of more than seven weeks of day work and night work away from his office, exclusive of time spent in his office necessarily required to present to the court the true facts and to establish that the affidavits supporting the motion for summary judgment are false, deceptive and not made in good faith, and has expended in excess of $750 for travelling and expenses away from his office, and in excess of $300 for stenographic help directly attributable to said work, and in excess of $100 for postage and telephone calls directly attributable to said work.

That to affiant's knowledge, Richard K. Baker has devoted more than three weeks of day work and night work of his time and John Janney has devoted more than eight weeks of day work and night work of his time in assisting affiant to present the true facts of the case to the Court.

That affiant verily believes that all of this effort and expense has directly resulted from the affidavits supporting the motion for summary judgment filed herein which set forth false inferences drawn from true facts without disclosing the true facts, and omit facts which omissions result in false impressions of facts being imparted to one who reads the said affidavits and does not know all of the real facts in addition to the false statements contained in said affidavits, and affiant has made every move and taken every step known to affiant to avoid the

incurring of the aforesaid expense and the expenditure of the aforesaid time, and verily believes that had Percy H. Clark either disclosed all of the facts and only the true facts, or been willing to return from Pennsylvania to the jurisdiction of this Court instead of filing papers from Pennsylvania after he commenced this action as attorney of record for plaintiff the occasion or necessity for incurring said expenses and expending said time would not have arisen.

/s/ FRANCIS T. CORNISH

Subscribed and sworn to before me this 22nd day of May, 1949.

[Seal] /s/ GLENDA P. QUIRK,

Notary Public in and for the County of Lincoln, State of Nevada.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 24, 1949.

[Title of District Court and Cause.]

MOTION TO STRIKE PORTIONS OF AFFIDAVIT OF PERCY H. CLARK IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant, Pioche Mines Consolidated, Inc., hereby moves the Court to strike from the Affidavit of Percy H. Clark filed herein in support of Motion for Summary Judgment each and all of the following parts and portions:

1. Commencing with "and has deposited" (page

2, line 5), to and including "Debenture Holders Agreement" (page 2, line 6).

2. Commencing with "and the non-negotiable" (page 2, line 8) to and including "that company." (page 2, line 10).

3. Commencing with "that, in order" (page 2, line 21) to and including "of the merger." (page 2, line 28).

4. Commencing with "It was at" (page 3, line 5) to and including "return to Philadelphia" (page 3, line 10).

5. Commencing with "That deponent" (page 3, line 11) to and including "said document" (page 4, line 2).

6. Commencing with "In January" (page 4, line 14) to and including "Exhibit 3" (page 5, line 19).

7. Commencing with "In 1938 Pioche Consolidated" (page 5, line 26) to and including "early in 1939" (page 6, line 8).

8. Commencing with "That on May 9, 1939" (page 6, line 17) to and including "examination" (page 7, line 7).

9. Commencing with "It was not until" (page 7, line 14) to and including "paragraph" (page 8, line 4).

10. Commencing with "On November 17, 1939" (page 8, line 5) to and including "January, 1940" (page 8, line 11).

11. Commencing with "Since the filing" (page 8, line 12) to and including "February 17, 1941" (page 8, line 18).

12. Commencing with "After this date" (page

8, line 19) to and including "deponent's office" (page 8, line 20).

13. Commencing with "stating Pioche" (page 8, line 23) to and including "have to make" (page 8, line 26).

14. Commencing with "indicated his company" (page 8, line 30) to and including "satisfactory" (page 9, line 4).

15. Commencing with "Arrangements were made" (page 9, line 8) to and including "declined to do so." (page 9, line 12).

16. Commencing with "Mr. Janney" (page 9, line 18) to and including "discontinued" (page 9, line 21).

17. Commencing with "Deponent calls," (page 10, line 8) to and including "long term lease" (page 10, line 13).

18. Commencing with "On June 3, 1942" (page 10, line 14) to and including "should be settled" (page 10, line 21).

19. Commencing with "A memorandum" (page 10, line 21) to and including "negotiations were based" (page 11, line 7).

20. Commencing with "The Debenture Holders" (page 11, line 8) to and including "reach an agreement" (page 11, line 14).

21. Commencing with "Three conferences" (page 11, line 14) to and including "to be ended" (page 12, line 7).

22. Commencing with "the" (page 12, line 8) to and including "final form" (page 12, line 10).

23. Commencing with "The sequel" (page 12,

line 16) to and including "long term lease" (page 12, line 22).

24. Commencing with "On September" (page 12, line 27) to and including "rather than serially" (page 13, line 4).

25. Commencing with "A careful analysis" (page 13, line 8) to and including "conferences and negotiations" (page 13, line 19).

26. Commencing with "On December 14th" (page 13, line 24) to and including "to the plan" (page 13, line 29).

27. Commencing with "These letters" (page 14, line 18) to and including "abruptly changed" page 14, line 22).

28. Commencing with "By paragraph VIII" (page 15, line 6) to and including "such consents" (page 15, line 24).

29. Commencing with "The realization" (page 15, line 24) to and including "1)." (page 16, line 4).

30. Commencing with "They also realized" (page 16, line 4) to and including "to this affidavit" (page 16, line 13).

31. Commencing with "Deponent in accordance" (page 16, line 14) to and including "Assents secured" (page 16, line 19).

32. Commencing with "Later in response" (page 16, line 22) to and including "to Mr. Woods" (page 16, line 25).

33. Commencing with "Mr. John T. Thatcher"

(page 16, line 27) to and including "anything else" (page 17, line 8).

34. Commencing with "It seems" (page 17, line 9) to and including "would be deposited" (page 17, line 12).

35. Commencing with "The letters attached" (page 17, line 30) to and including "on the other hand" (page 18, line 10).

36. Commencing with "Deponent does not refer" (page 18, line 11) to and including "Merger Agreement" (page 18, line 18).

37. Commencing with "Plaintiffs in this paragraph" (page 19, line 6) to and including "Exhibit 9" (page 19, line 17).

38. Commencing with "For some reason" (page 19, line 24) to and including "still out" (page 19, line 29).

39. Commencing with "The statement" (page 20, line 6) to and including "Pioche Consolidated" (page 20, line 14).

40. Commencing with "deponent" (page 20, line 15) to and including "November 17, 1944" (page 20, line 23).

41. Commencing with "That the facts" (page 20, line 26) to and including "Complaint are true" (page 20, line 27).

42. Commencing with "Referring to 12(e)" (page 20, line 28) to and including "matter for the court" (page 21, line 18).

43. Commencing with "Fidelity is entitled" (page 21, line 19) to and including "discontinuance of the suit" (page 21, line 21).

44. Commencing with "suggesting how the necessary funds" (page 21, line 28) to and including "make the loan" (page 21, line 29).

45. Commencing with "Defendants in 12(e)" (page 22, line 5) to and including "reorganization of old company" (page 22, line 16).

46. Commencing with "The complicated and entangled" (page 22, line 27) to and including "Richard E. Dwight" (page 23, line 12).

47. Commencing with "Deponent first" (page 24, line 1) to and including "Thatcher" (page 24, line 15).

48. Commencing with "Later," (page 24, line 24) to and including "Supplemental Complaint" (page 25, line 11).

49. Commencing with "That Committee" (page 25, line 12) to and including "the reorganization" (page 25, line 18).

50. Commencing with "That the facts" (page 25, line 19) to and including "letters attached hereto" (page 25, line 23).

51. Commencing with "Deponent denies" (page 25, line 28) to and including "this affidavit" (page 25, line 30).

52. Commencing with "Deponent is advised" (page 26, line 1) to and including "material fact" (page 26, line 4).

53. Commencing with "Assuming the facts" (page 26, line 11) to and including "parties concerned" (page 26, line 20).

54. Commencing with "There has been no conspiracy" (page 26, line 21) to and including

"parties to this suit are interested" (page 27, line 1).

55. All that portion designated "A" from pages 3 through line 18 on page 18.

Said motion will be made upon the grounds that each and all of said portions do not conform to the requirements of Rule 56(e) of the Federal Rules of Civil Procedure, are false, are calculated to deceive the Court, are conclusions of law, are hearsay, are inferences drawn from other facts which are not stated, contradict provisions of writings, vary the terms of writings, that said affidavits do not show affirmatively that the affiant is competent to testify to the matters stated therein, and on each ground.

Said motion will be based upon all of the records and papers on file herein, including the answers to interrogatories about to be filed and the interrogatories already propounded, and the admissions of fact about to be made and filed and the request for admission of fact already made, and upon all papers, pleadings and affidavits offered at the hearing of the motion for summary judgment, either in support or in opposition.

/s/ FRANCIS T. CORNISH
Attorney for Defendant Pioche Mines Consolidated, Inc.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 24, 1949.

[Title of District Court and Cause.]

MOTION TO STRIKE PORTIONS OF AFFIDAVIT OF MILES S. ALTEMOSE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant, Pioche Mines Consolidated, Inc., hereby moves the Court to strike from the Affidavit of Miles S. Altemose filed herein in support of Motion for Summary Judgment each and all of the following parts and portions:

1. Commencing with "Deponent further avers" (page 2, line 25) to and including "1929 and 1930" (page 3, line 3).

2. Commencing with "With respect to" (page 4, line 3) to and including "true and correct" (page 4, line 11).

3. Commencing with "Deponent does not" (page 4, line 11) to and including "Merger Agreement" (page 4, line 21).

4. The incorporation by reference of Paragraph IV (page 4, line 29).

5. The incorporation by reference of Paragraph V (page 4, line 29).

6. The incorporation by reference of Paragraph VI (page 4, line 29).

7. The incorporation by reference of Paragraph VII (page 4, line 29).

8. The incorporation by reference of Paragraph X (page 4, line 30).

9. The incorporation by reference of Paragraph XII, a, b, c, f (page 4, line 30).

10. Commencing with "That there is no" (page 5, line 11) to and including "Agreement of 1942" (page 5, line 16).

11. Commencing with "On the contrary" (page 5, line 16) to and including "Depositary" (page 5, line 18).

12. Commencing with "And has acted" (page 5, line 18) to and including "and Depositary" (page 5, line 21).

13. Commencing with "That in particular" (page 5, line 22) to and including "Settlement Agreement" (page 5, line 27).

14. Commencing with "Deponent further avers" (page 6, line 13) to and including "Supplemental Complaint" (page 6, line 17).

15. Commencing with "Deponent further avers" (page 6, line 18) to and including "series of letters" (page 6, line 24).

16. Commencing with "That Fidelity's" (page 7, line 5) to and including "by copies" page 7, line 5).

17. Commencing with "That a reading" (page 7, line 17) to and including "material facts" (page 7, line 26).

18. Commencing with "Deponent is advised" (page 7, line 28) to and including "filed in this cause" (page 8, line 5).

Said motion will be made upon the grounds that each and all of said portions do not conform to the requirements of Rule 56(e) of the Federal Rules of Civil Procedure, are false, are calculated to deceive the Court, are conclusions of law, are hearsay, are inferences drawn from other facts which are not

stated, contradict provisions of writings, vary the terms of writings, that said affidavits do not show affirmatively that the affiant is competent to testify to the matters stated therein, and on each ground.

Said motion will be based upon all of the records and papers on file herein, including the answers to interrogatories about to be filed and the interrogatories already propounded, and the admissions of fact about to be made and filed and the request for admission of fact already made, and upon all papers, pleadings and affidavits offered at the hearing of the motion for summary judgment, either in support or in opposition.

/s/ FRANCIS T. CORNISH,
Attorney for Defendant Pioche Mines Consolidated, Inc.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 24, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF T. MITCHELL HASTINGS
In Opposition to Motion for Summary Judgment and in Support of Motion for Relief Under Rule 56(g) of the Federal Rules of Civil Procedure.

State of Massachusetts,
County of Norfolk—ss.

T. Mitchell Hastings, being first duly sworn, deposes and says that he is now a resident of the State

of New Hampshire, having formerly resided in Philadelphia, Pa., and Santa Barbara, Calif.

That he first became interested in the Pioche development in 1925, and after two visits to Pioche studying conditions, he became a heavy investor on his personal account and organized the Philadelphia group of investors and raised the sum of $250,000 from a small group of his friends and former associates who invested in stock of the Pioche Mines Company at $5.00 per share. Among the smaller of these investors in this group was Percy H. Clark, a member of the Clark law firm, and also associated with the firm of E. W. Clark and Company, bankers, and that without any formal action on the part of either affiant or the company Clark assumed the role of leader of the Philadelphia group in 1926-27, and also became attorney for the Pioche Mines Company, and in December 1928, under advice of Percy H. Clark as company attorney, the Pioche Mines Consolidated was formed and this deponent, as one of the large stockholders in the company, voted in favor of the steps taken at that time which included an issue of debenture bonds of which Fidelity Philadelphia Trust Company was Trustee. Affiant approved this bond issue relying upon the promise made by Percy H. Clark and John E. Zimmermann that if after issuing the bonds additional financing should ever be needed they would assist in providing for such needs.

That deponent, as a large stockholder of the Pioche Mines Consolidated, frequently attended meetings relating to its affairs in Pioche, in Phila-

delphia and later in Boston; that in 1935 when the financing plans of the company were being obstructed in various ways which were known to this deponent (see Exhibits H-18 and H-19), he gave assistance in overcoming the difficulties created at that time by personally lending $67,000 to the Pioche Mines Consolidated, which was needed to complete a first unit of 100 ton daily capacity mill then under construction as part of a general plan to replace the 300 ton mill which had been destroyed by fire of incendiary origin while Affiant was in Pioche in 1929.

That by reason of the aforesaid loan of $67,000 made by this deponent he became one of the large unsecured note holders of the Pioche Mines Consolidated. That Affiant, as a member of the Boston Committee of Stockholders and Creditors, had direct knowledge of various acts of Percy H. Clark while acting as attorney for the company which interfered with the Boston financing, and made payment of Affiant's note impossible.

That Affiant was present at a conference with the other principal note holders, held in New York on February 19th, 1938, at the suggestion of Mr. A. P. Gerhard who was present and represented the Debenture Holders' Committee to discuss the Conversion Plan then under consideration; That note holders present held $217,668.31 of notes and the scattered note holders referred to in Clark's Affidavit who were not present held less than $5,000; That Affiant as a note creditor of the company in the aforesaid amount of $67,000 agreed at the meet-

ing, along with the other note holders present, that he would accept any form of settlement that would facilitate the financing of the company, and he signed an acceptance of a plan which Mr. Gerhard agreed was fair and would be acceptable to the Debenture Holders' Committee, which acceptance was later submitted to a meeting in Mr. Zimmermann's office in Philadelphia, with Mr. Clark and Mr. Gerhard, the other members of the committee present, also Richard E. Dwight and Richard K. Baker, and deponent later signed a changed form of agreement to meet objections offered by Mr. Clark, which seemed to Affiant to be of little or no consequence. Deponent attaches hereto a copy of the said consent, marked Exhibit H-1.

That Affiant was willing to accept any method of payment as were the other note holders present, which would be conducive to putting over the plan and thus getting rid of the interference with the company's affairs continually thrown in its way by the debenture holders' group.

That Affiant has read the Affidavit of the aforesaid Percy H. Clark, and says that the statement therein (Page 5 Line 16 and 17) that the assent of the note holders was never secured and that the company failed to furnish important information is completely untrue. That at the said meeting of February 19th, Mr. Gerhard was given all information requested from the company including a statement of accounts payable to trade creditors brought down to date, and he expressed himself as being entirely satisfied with the information given, and all of the

note holders present were willing to do what Mr. Gerhard in his capacity of representing the debenture holders could work out as a reasonable settlement, and that what they offered to do was declared by Mr. Gerhard to be acceptable, and was later approved as above stated by the whole committee.

At this meeting Mr. Gerhard said that only three of the Trustees who held Pioche debentures had offered any objections, and after the meeting going over on the train to Philadelphia Mr. Gerhard informed Affiant that Percy Clark had made no real effort to get consents to the plan from the debenture holders who were represented by Trustees, and that the three who had refused represented only $29,000, which was less than 5%.

That the open opposition of Percy H. Clark to the Conversion Plan of 1937-8 became evident after January 31, 1938, when he injected into the plan for the first time the requirement that Pioche Mines Consolidated give his law firm a general release, which release was not given.

That between the year 1925 to 1939 Affiant spent much of his time in Pioche and as an architect designed a number of houses for the use of the company. He attended many meetings and was close to the affairs of the company, and he together with Percy H. Clark and other visiting stockholders in June 1928 signed a report, which was sent out to the stockholders, reporting the condition of the affairs of the company. A copy of this report is filed herewith as Exhibit H-2 and contains the following statement:

"An examination of the books of the company shows that they are well kept, which indicates careful management. We believe the company's money has been well and economically expended."

Affiant further states that there was no change in the management between the date of this report signed by Percy H. Clark and the date of the Lieb report, except when the consolidated company was formed Percy H. Clark assumed supervision of the accounting and insisted upon changes in the accounts which later led to considerable confusion and caused the delay Clark complains of on pages 6 and 7 of his Affidavit.

That Affiant has read the Affidavit of Percy H. Clark, page 7, which gives the impression that an audit of the accounts was made by Barrow, Wade, Guthrie & Co. in October 1929. Affiant being familiar with the records and affairs of the company knew that the so-called auditor's report of Mr. Lieb could not have been based on an audit of the accounts, and this was admitted by Barrow, Wade, Guthrie & Co. in letter hereto attached marked Exhibits H-3 and H-4.

Affiant joined in with others of the Boston Group who held meetings to investigate the Lieb report which had been circulated among debenture holders for the purpose of inducing them to join the suit. That in an effort to have corrected some of the most glaring errors and omissions contained in said report they wrote Barrow, Wade, Guthrie & Co. a

series of letters, copies of which letters are hereto attached as Exhibit H-5, H-6, H-7, H-8, H-9, H-10, H11, H-12, H-13, H-14, H-15, H-16, and H-17. These letters were without satisfactory reply and the Boston Committee concluded that the Lieb report was a deliberate misrepresentation of company affairs made to aid the plan to bring this law suit for which purpose it was used, as is now admitted in the Affidavit of Percy H. Clark, page 8, line 5-11.

That Mr. A. L. Putnam, Chairman of the Boston Committee went to Pioche to make an examination of the records, and later reported to the Boston Committee that the Lieb report was unworthy of credence, and that the company's audit made immediately before by Dewey A. Simon reflected the true condition of the company records, and constituted a satisfactory refutation of the statement in the Lieb report that the accounts could not be audited, and a rebuke to the Debenture Holders' Committee for circulating the Lieb report.

That in December 1941 Affiant attended a meeting of Boston Stockholders and Creditors in Boston with Mr. Joseph S. Clark of Philadelphia, senior member of the Clark law firm, representing the Debenture Holders' Committee, and a tentative agreement of settlement with the Debenture Holders was reached in this meeting and reduced to writing and approved by all present. Later in a letter to the Boston Committee Percy H. Clark repudiated the agreement reached stating that Joseph S. Clark was lacking in authority. This caused the Boston Committee to conclude that further conferences with the

Debenture Holders' Committee would be useless unless the debenture holders were first committed to a definite agreement. Attached hereto as Exhibit H-20 is a letter dated December 17, 1941 to Jos. S. Clark from the Boston Committee signed by A. L. Putnam, member of said Committee, which confirmed what took place at the above meeting.

That in 1943 at the stockholders' meeting held at Pioche to consider the plans for merger and the Settlement Agreement of July 8, 1942, Affiant was represented by Richard K. Baker with authority to approve the Settlement Agreement and merger and to turn in the $67,000 of notes above referred to, and to take new income bonds in exchange therefor as provided in the Settlement Agreement.

That based on the assurances given to the stockholders' meeting on December 3, 1943, by the Debenture Holders' Committee to the effect that all of the debenture holders on Fidelity's list had become bound to exchange their old debentures for the new securities as soon as the approval of the stockholders' meeting had been filed with the Secretary of State of Nevada, Affiant turned in his $67,000 of notes and has received and accepted the new income bonds in exchange therefor.

That Deponent quotes the following from Affidavit of Percy H. Clark, page 15, line 24 to 30:

> "The realization that the Creditors' Committee and others did not propose to cooperate with the Committee brought back forcibly to their recollection the reasons why the reorganization of 1938 had not been consummated particularly

> the failure of John Janney and his companies to furnish important information and of other creditors to come in under the plan,"

and avers that as an unsecured creditor he has fully cooperated in every plan that would lead to ending the difficulties which have been created by Fidelity Philadelphia Trust Co., Percy H. Clark and other debenture holders in delaying completing the Settlement Agreement.

That in view of the foregoing Affiant considers the representation untrue as contained in Affidavit of Percy H. Clark to the effect that the Conversion Plan of 1938 failed because the unsecured note holders refused to respond to the request of the debenture holders, and reiterates that he and all other note holders present at the meeting of February 19, 1938 complied with requests of Debenture Holders and Mr. Clark's later modification of same, and the real reason for the failure of the plan followed from Clark's failure to secure a general release which he demanded for his firm.

That Deponent met every request of the Debenture Holders' Committee in relation to the 1938 Conversion Plan and his stock was voted at stockholders' meeting called to approve settlement and merger held July to December 1943. The records of the merger show that practically all of the unsecured note holders have turned in their notes, and accepted new securities in payment therefor, while Fidelity Philadelphia Trust Co., and the Clark group of debenture holders are still making excuses and stalling.

Attached hereto and marked Exhibit H-21 is a copy of the report of the Protective Bondholders' Committee, dated April 15th, 1941, which was mailed out to all the debenture holders. That Affiant is the T. Mitchell Hastings and "a leading stockholder" mentioned in the second and third paragraphs of the report, and avers that the facts stated therein are true; That the Theodore E. Brown and Henry G. Brooks, men of highest standing in their community, who signed the report are life long friends and close associates of Affiant.

Also attached are letters of Affiant to John E. Zimmermann dated June 21, 1937, marked Exhibit H-18, and letter of Affiant to Percy H. Clark dated May 22, 1940, marked Exhibit H-19. Affiant certifies all copies attached hereto are accurate copies of originals.

/s/ T. MITCHELL HASTINGS

Subscribed and sworn to before me this 16th day of May, 1949.

[Seal] /s/ EDWARD E. HEDLUND,
Notary Public in and for the State and County aforesaid.

EXHIBIT H-1

Pioche Mines Consolidated, February 21, 1938
Pioche, Nevada

Gentlemen:

Confirming our conversation in New York on Saturday, February 19th, I am willing to cooperate in the reorganization agreement proposed for the conversion of debentures and will accept in payment

for outstanding loans to date which I have made your company, fifty percent (50%) in stock of the company at $2.50 per share, as provided for in the said reorganization agreement upon the same terms and conditions as apply to the conversion of the bonds; and the balance of said obligations, namely 50%, to be paid in cash at such date or dates as may best serve the interest and convenience of the company in the judgment of its officers and directors, all as provided in the said reorganization agreement conditioned upon the bonds being converted and with the option to the company to extend the date provided in such agreement from July 1, 1943 to July 1, 1948, if such extension proves to be necessary.

The loans I have made to the company to date and still outstanding and referred to above, are as follows:

January, 1935	$40,000.00
November, 1935	10,000.00
May, 1936	9,000.00
August, 1936	5,000.00
August, 1936	3,000.00
Total	$67,000.00

Very truly yours,

/s/ T. Mitchell Hastings

EXHIBIT H-2

* * * * *

Visitors' Report

* * * * * June 4, 1928

An examination of the books of the Company show that they are well kept which indicates careful management. We believe the company's money has been well and economically expended. This is indicated by the reports of engineers and others competent to judge that the Mill, which includes the latest designs of machinery and process, could not be reproduced expect at a much greater cost than the actual outlay. The same thing applies to the construction of the aerial tramway and the development of the mines. The whole assembled equipment and development seems to us splendidly adapted to the economic prosecution of the Pioche enterprise.

* * * * *

EXHIBIT H-3

Barrow, Wade, Guthrie & Co.
Girard Trust Bldg., South Penn Square
Philadelphia, Pennsylvania

Mr. Theodore E. Brown, Feb. 14, 1940
75 Federal St., Boston, Massachusetts

Dear Sir:

We have received several letters from you and Mr. Clark has advised you why we have not replied.

You must realize that it was impracticable for us to make a satisfactory examination within a reasonable period of time for the reasons given in our

report. Before Mr. Lieb went to Pioche, we had been furnished with a considerable amount of information concerning the affairs of the Pioche Company by the Debenture Holders' Committee. The report was not intended to give all the information in our possession, but only such information as we secured in addition to that which we had received from the Committee. The information given us by the Committee you should secure from it rather than from us.

You suggest in the last paragraph of your letter that we have made misstatements in our report. If you will advise us of the misstatements to which you refer and give your reasons for believing them to be incorrect, we will be glad to check the sources of our information and to correct any misstatements we may have inadvertently made. Without knowing to what statements you refer, it is impossible for us to discuss them.

Very truly yours,

/s/ Barrow, Wade, Guthrie & Co.

FS:FH

EXHIBIT H-4

Barrow, Wade, Guthrie & Co.
Girard Trust Building, South Penn Square
Philadelphia, Penn.

Mr. Theodore E. Brown Feb. 20, 1940
75 Federal St., Boston, Mass.

Dear Sir:

We are glad to note from your letter of February 16th that you do not point out any misstatements

in our report to the Pioche Debenture-holders' Committee. The inferences you draw in your letter from our report are entirely unjustified. We delivered to Debenture-holders' Committee with the report a list of the officers and employees of Pioche Consolidated and the salaries paid to each of them.

Our report draws no conclusions from the facts it gives relating to interest. The facts were intended to supplement other information on the subject in the possession of the Committee.

This firm was engaged to perform a service for the Debenture-holders' Committee. We have given that Committee a confidential report for which we are responsible to no one but the Committee. We shall be glad to correct any errors we may have inadvertently made but, as already stated, our report does not give all of the facts of the situation and was not intended to do so. No inferences can properly be drawn from the report without knowledge of other information available to the Committee. We must respectfully decline to answer further questions of the nature you have submitted.

Yours very truly,

/s/ Barrow, Wade, Guthrie & Co.

FS:LM

EXHIBIT H-16

Barrow, Wade, Guthrie & Co. Feb. 23, 1940
Girard Trust Bldg., Philadelphia, Pa.

Dear Sirs:

The letter dictated earlier today was the result of a further discussion among our Boston group,

about the Pioche report. Now I have your letter of the 20th, which was apparently delayed in delivery and in which it is noted that you decline to answer further questions that we might submit to you. I once again got our group together, read your letter, and give you forthwith our impressions.

In view of statements made in your letter of the 20th, similar to previous ones, it is the concensus of opinion that your whole report is one of misconception and half-truths. Unless you will avail yourselves of our questions, the only other defense to our Company is to have our own audit made.

Inasmuch as your report has been given wide circulation, and also used as a basis of action against our Company, we shall recommend that your firm be held responsible for its defects.

Our questions to your firm were as much to give you an opportunity to correct misleading statements as to clear our management of what seems to us to be scathing reflections and unjust insinuations.

Your letter of February 14th in which you say that "you were furnished with a considerable amount of information concerning the affairs of the Pioche Company by the Debenture Holders' Committee" and also that the report was intended to give out such information as you received from the Committee, seems to answer the questions that we have asked in respect to your report.

Yours very truly,

/s/ Theodore E. Brown

TEB:B

EXHIBIT H-17

Barrow, Wade, Guthrie & Co. March 12, 1940
Girard Trust Bldg., Philadelphia, Pa.

Dear Sirs:

Referring to report of your Mr. Lieb purporting to be an audit of the books and records of the Pioche Mines Consolidated, I am one of a group of Pioche security holders in Boston who have been studying Mr. Lieb's report.

This report has been circulated among interests in the company of whom I am one and I happen to be very familiar with the affairs of the Pioche Company, having spent many months at various intervals in Pioche, and am a heavy investor.

Mr. Theo Brown who has been studying this report with us is absent from Boston at this time. Therefore, I am writing to you as to what would seem to be a misrepresentation of a very important fact being circulated in the Lieb report.

I quote from Mr. Lieb's report the following:

"According to the Minutes of the Board of Directors, dated Dec. 3, 1938, Mr. Janney gave an option to R. K. Baker to purchase 30,000 shares of his personal stock at $1.00 per share. The stock in question was stated to be deposited in the pool and the option, which may be exercised in whole or in part and is assignable, expires sixty days after dissolution of the pool. We inspected stock certificate No. 20, in the name of John Janney, for 50,000 shares (not deposited in the pool), which is set aside by the company with a signed copy of this option agreement."

We have a personal acquaintance with Mr. R. K.

Baker mentioned in the above. From him we know that the above is not a reflection of the truth in the matter reported. I enclose herewith a copy of the letter to Mr. Baker setting forth this arrangement, and I ask you this question:

> Was Mr. Lieb shown the enclosed contract while in Pioche, and engaged in making the audit which his report is supposed to reflect?

You have not answered the previous questions which this group has asked of your firm. We nevertheless feel free to investigate your report and the accuracy of its statements.

We have been sent copies of this report by the bondholders' committee. We know that your report has been freely circulated by the bondholders' committee. We believe your report was made for the purposes of the bondholders' committee. This so-called auditor's report is in our view not a complete and accurate representation of the facts which your auditor had access to in the records of the company on his visit to Pioche, and therefore gives a misleading and misrepresentation of said complete facts.

In the above circumstances we certainly have a right to ask you the above questions and expect you to make a definite reply thereto. Your answer "yes" or "no" will be sufficient.

Very truly yours,

For the Boston Group of Pioche Security Holders:

/s/ T. Mitchell Hastings

EXHIBIT H-18

T. Mitchell Hastings
1811 Walnut St., Rittenhouse Club, Philadelphia, Pa.

Mr. John E. Zimmermann June 28, 1937
c/o United Gas Improvement Company
1401 Arch St., Philadelphia, Pa.

My dear Mr. Zimmermann:

I am writing you as I should like to have a talk with you about Pioche matters when you can spare the time, for I am convinced that a situation now exists that is serious to all our interests, and to the future success of that enterprise, and that conditions have been created which pretty completely tie the hands of the management and block every effort they may make to proceed with the very necessary financing needs along lines they believe to be to the real interests of all concerned.

As you know, I have a large interest and responsibility at stake in Pioche, both on account of personal investment there and also because of the large number of my friends in Philadelphia who invested in Pioche through my efforts in 1925 and 1926, and I believe you are possibly also somewhat in the same position, though perhaps not to so great an extent as I am, and must feel as I do as to seeing Pioche successful.

I was first in Pioche in 1924, and after considerable delay and negotiations and thoroughly satisfying myself of its possibilities and management, undertook, in the Fall of 1925, the position with the Company to raise the funds for a $250,000.00 fund

they then desired to raise through stock sales. This I did among my friends, largely in Philadelphia, and I formed the Philadelphia group of stockholders at that time. Among them was Mr. Percy Clark, who I believe subscribed $5,000.00 then.

Following this I was also considerably responsible in helping with additional amounts being invested by friends and others, so you can understand why I feel quite a sense of responsibility.

My first embarrassment in my relations with Pioche arose when Mr. Clark later assumed the "head" of the Philadelphia group, so I withdrew into the background and have not had much to do since with the relations between the Company and the Philadelphia stockholders, believing this the best thing to do with Mr. Clark interested and active of his own choice and as I then believed co-operatively so, and especially as I was not living in Philadelphia at that time and he was.

However, recent events make me feel that I again hold quite a responsibility, as must others in my position, for I am satisfied that the management of the Company is now being seriously handicapped and interferred with and that unless the Philadelphia stockholders and bondholders who are really interested, understand the situation and help straighten things out with and for the management, there is a great question in my mind as to the loss they may sustain.

I have reached these conclusions only after keeping as closely in touch as possible with Pioche affairs, both at Pioche and in the East. Last Summer

I spent four months at Pioche and the previous Summer two months, one in the Spring during construction of the first unit of the Mill, and one in the Fall when the Mill was started in operation. I was also present at the meeting between Mr. Janney and Mr. Percy Clark and the members of his firm on February 5th last to discuss Mr. Clark's resignation as attorney. Mr. E. O. Bogert, one of the underwriters, was also there.

At this meeting I was rather shocked to hear Mr. Clark threaten the Company with adverse action by the bondholders if the Company accepted his resignation as attorney and did not retain him as attorney for the prospectus, a resignation Mr. Clark had, I believe, previously sent into the Company himself. It was indeed a revelation to me to see an attorney demanding on one hand that he be retained as attorney representing the Company's interest and its management, and on the other hand threatening the same Company as apparently representing the bondholders should the Company refuse to do just as he dictates to them. The impression received was certainly not a good one viewed from the ethical or moral point of view and I began to realize more clearly what the management has really been up against through these past few years in having to cope with such an attitude towards them on the part of the attorney supposedly representing them.

What I am now wondering is, does Mr. Percy Clark or his firm represent the bondholders and have the bondholders given him any such authority to represent them in such ways as this, and to use

them as a club or threat over the heads of the management to compel them to follow out his ideas against possible opposite judgment on their part? Do you believe this to be the case?

I doubt if the management has actually had in all during this past year more than 6 to 8 weeks in which they were free to actually sell stock or to give their undivided attention and effort to any such constructive forward accomplishment, owing to the delays placed in the management's way in the preparation and registering of the various prospectuses and counter-proposals of financing proceedings placed before them.

The Directors and management have been and are being kept so steadily diverted and interfered with by complicated questions and suggestions thrown at them for consideration by Mr. Percy Clark and his firm, one after the other, and keeping matters in a continual turmoil, that I am forced to seriously question if these actions are really activated with any constructive motive back of them. Certainly to date the result is being completely destructive and very costly to the stock and bondholders—how costly time alone will tell.

This is why I should like to confer with you and help, if I can, to work out something constructive which the Philadelphia group of bondholders can do in this situation and which will permit the management to be able and free to go ahead with real accomplishment and without the possibility of such interferences and threats being interjected into the way of progress, and I believe this can be done.

There are many other occurrences similar in type and effect which I would like to go into with you, but will not attempt to do so in this letter, which has already run into too great length, but I know you will realize it is all much on my mind and therefore understand.

With kindest regards, and awaiting your further wishes, I am

Sincerely,

/s/ T. Mitchell Hastings

TMH:L

EXHIBIT H-19

T. Mitchell Hastings
192 Commonwealth Avenue, Boston, Mass.

Mr. Percy H. Clark May 22, 1940
c/o Clark, Hebard and Spahr
1500 Walnut St., Philadelphia, Pa.

Dear Percy:

I have just recently arrived home from a five week trip of travel South and South-west and find your letter of April 12th last awaiting me here. It should have been forwarded on to me with other first class mail, but was held here through some oversight on some one's part, as was also a number of other important letters which should have been sent to me.

Answering your letter I would say that it hardly requires a Philadelphia lawyer to explain or tell that there is something "rotten in the house of Denmark" as to the Pioche situation and what it is you know as well or better than I do. When you

ask me to tell you facts which you must know better than I do, I am inclined to smile.

You know perfectly well we have had at Pioche an honest and conscientious management, actually making every personal sacrifice in the interest of the investors. I have been there often and I know this also. It was you who asked for and demanded this bond-issue and for the consolidation also. You also agreed to act as attorney for the Company.

Now as attorney for the bond-holders, you are having the auditor you sent out pick flaws in your own work on the opposite side of the fence as attorney for the bond-holders Committee. How can you occupy such an irreconcilable position?

I know more than you think of the effects of the roll you have played as attorney for the Company in your constant interferences with their judgment and plans for progress through past years and ever since you insisted on the consolidation into the new Company and on the Bond issues. Why have you not seen that the details were properly handled, if they were mishandled? That was your duty as attorney.

Now, more recently, you have obstructed the work of Mr. Baker and also of Mr. Bogert, and have spread discouragement everywhere, and this Lieb report appears to me to be a very good example of it. If you can not see what is mis-leading about it, do not ask me.

The Company could have sold its stock at par. Its bonds could have been made worth more than par, if you had elected to co-operate constructively with the management or even had remained silent

and kept out of its affairs, unless what I have been told and shown is quite false and which I do not believe it to be for one moment.

You say that I did not write that letter to Mr. Lieb's firm. The Boston group are acting as a Committee and I wrote that letter in carrying on for Mr. Theodore Brown, our chairman, during his absence from Boston, for the group and in continuation of the questions he had previously written Mr. Lieb's firm in collaboration with the group here. Do you write in collaboration with your associates? While you were attorney for the Company did you write your letters in collaboration with your client or did you write outsiders about your clients business and without getting your clients consent or approval?

I think, Percy, you are just one hundred per cent responsible for the loss of our money which we have put into Pioche. That is my personal belief and opinion. You must know the Lieb report and your Complaint do not reflect the whole truth nor the complete facts. It is not my responsibility to enlighten you, but it is your responsibility to get yourself straightened out on all this as soon as you can do it and to make full amends for any and all actions which may have been detrimental to the real interests and success of the enterprise.

As always,

/s/ T. Mitchell Hastings

EXHIBIT H-20

Mr. Joseph S. Clark December 17, 1941
1500 Walnut St. Bldg., Philadelphia, Pa.

My dear Mr. Clark:

Present at our meeting yesterday were Augustus Hemenway, Henry M. Williams, T. Mitchell Hastings, John Pickering, and myself representing the Boston group of Stockholders, John Janney representing the Pioche Companies, and yourself representing the Philadelphia Bondholders.

This meeting was called at your request. Its purpose was to work out a plan for the consolidation of the properties of the Pioche Mines Company, the Pioche Mines Consolidated and the Nevada-Volcano Mines Company. The U. S. Smelting Company with whom our company has been in negotiations with the view of operating these properties under a lease, have asked that this consolidation be effected as a condition to further negotiations.

The Boston stockholders have had several meetings during the last three weeks to give consideration to a proposal from your Bondholders group which in substance is: Give the creditors 40 year 5% income non-cumulative bonds and provide a stock issue to be distributed 50% to the creditors and 50% to the stockholders.

We were not able to arrive at any agreement at our previous meetings and this meeting was for the purpose of conferring with you.

After a discussion for several hours it was proposed that the meeting should be adjourned to pre-

pare a memorandum of the points we had tentatively arrived at. A memorandum was then prepared and at an adjourned meeting certain modifications were incorporated based upon our further discussion. This resulted in the following terms and conditions being agreed upon as basis upon which the Boston stockholders would vote to approve your proposed plan for the merger of these properties. You joined in approving these detailed provisions and said you would submit them to the representative of the bondholders in Philadelphia and that you would favor their approval to the end that by Monday we would be in a position to go forward with another meeting here to finally approve this plan and authorize proxies to be issued favoring its adoption at the general stockholders' meeting later to be held.

1. In order that the proposed 40 year 5% income bonds would not deprive the stock of its fair value the bonds were to be the usual form of income bonds which would be non-cumulative and no sinking fund would be required.

2. These bonds are to be delivered in the amounts representing the face value of the Debentures held, notes held and other obligations of the company as of the balance sheet of August 31, 1939.

3. It is contemplated that certain amounts will have to be paid in cash: bank loans, taxes and so forth. To provide a fund for such payments and also to provide a fund for the expenses of the proposed reorganization—trustee fees, taxes, tranfer taxes, attorneys fees and so forth, it is agreed that

a fund of $100,000 is to be accumulated from the first earnings from the operation of the Pioche Mines Consolidated properties which shall be set aside to be divided as follows: $50,000 for paying obligations of the Pioche Mines Consolidated which will have to be paid in cash and $50,000 for the expenses of the consolidation above mentioned.

A similar fund is to be accumulated from the first returns from the operation of Pioche Mines Company properties to enable that company to pay $150,000 of emergency loans which were made in order to save the companies owning these properties from becoming insolvent and which are a claim upon Pioche Mines Company properties.

In order to facilitate the payment of legal fees it was later agreed that $20,000 of income bonds would be substituted for $10,000 of cash in which case the provision for consolidation expense would be cash $40,000 and $20,000 of income bonds. As a further provision for legal fees Mr. Janney expressed his willingness to stand by an offer which he had made in 1938 to contribute 20,000 shares of his personally owned Pioche Mines Consolidated stock to cover the legal fees of your firm down to January 1, 1938.

4. The new company to be formed for putting into effect this consolidation shall provide for an issue of stock 50% of which will be distributed among the stockholders and 50% will be distributed among the creditors in proportion to the amounts owing them as shown by the balance sheet of August 31, 1939.

In view of the fact that most of the $150,000 ob-

ligation of the Pioche Mines Company was loaned by it to the Pioche Mines Consolidated in order to avoid duplicating the stock distribution agreed to be paid to all creditors, it is understood that the $150,000 Pioche Mines Co. loans will only receive one distribution of shares and that distribution will go to those who advanced the money to the Pioche Mines Co.

All stock to be of the same class and to have equal voting rights.

5. After this consolidation and we are in a position to make a deal with the Smelting Company it is agreed that this deal be negotiated by Mr. Joseph S. Clark as representing the bondholders and Mr. John Janney as representative of the company. The arrangements which they may agree on will be subject to the approval of the bondholder group and the stockholders before final acceptance.

Very truly yours,

/s/ Augustus L. Putnam

EXHIBIT H-21

Protective Bondholders' Committee of
Pioche Mines Consolidated

April 15, 1941

To the Debenture Holders:

Under date of October 15th, 1940, a report was prepared by the undersigned Protective Bondholders' Committee, and it was distributed to some of the debenture holders. If you desire a copy it will be made available upon request to Lawrence R. Lee, 3 West 8th Street, New York City.

The purpose of our investigation was to try to find out in as impartial a way as possible just what were the facts which brought about the litigation which confronted the company.

There is no question as to the great potential value of these Pioche properties as confirmed by numerous reports from competent engineers. Has it occurred to you what will become of these properties and your interest in them, as a result of the present litigation which has followed a long period of interference and of usurping the powers of the company's Board of Directors?

The upkeep of these properties has been curtailed over a long period culminating in this litigation, the expense of which has absorbed large funds which would otherwise have gone into development and equipment. We submit, however, that these great potential values can yet be realized if the property is properly supported and we suggest that you reconsider the position that you may have taken, and give some thought to the following:

We have satisfied ourselves as to why our investment in debentures ceased to pay the interest as it became due, and is now precariously involved in litigation. We find that Mr. Percy H. Clark of the firm of Clark, Hebard & Spahr, and those associated with him, have brought about the present litigation in Nevada, which is the culmination of a long series of acts which we are confident were not to the best interest of the Bondholders. We are sure you will agree with us in this conclusion after the facts,

which we have studied and present to you herewith, have received your proper consideration.

We now refer to certain outstanding occurrences:

1. Since the time of the incendiary fire which burned the mill, the company has vigorously pursued the necessary financing to rebuild the mill and provide an adequate development and operating fund, but has found it difficult, in view of the apparent effort of Mr. Clark to thwart this action. Mr. Clark continuously set up his individual judgment in opposition to the judgment of the Board of Directors of the Company and its management, and the result was that the company's arrangements to finance the new mill have been disastrously obstructed and delayed.

Mr. Clark took steps which have had the net effect of delaying and defeating plan after plan to finance the company. Serious delays were in particular occasioned by Mr. Clark's activities which affected the company's relationship with the Securities Exchange Commission in Washington.

Under the Securities Act, it became necessary in 1935 to carry on negotiations with the Securities Exchange Commission. Mr. Clark was not a member of the Board of Directors, but he took it upon himself to negotiate with the S.E.C. in Washington concerning technical mining matters, in relation to the Registration of the company's shares, which were essentially within the province of the Board. Such negotiations were indefensible in two respects:

(a) Mr. Clark insisted on there being put into the prospectus a statement which in the

judgment of the Board of Directors would have defeated financing; and

(b) he insisted on statements being left out of the prospectus which in the judgment of the Board of Directors would have made the Company liable to the serious charge of withholding material facts.

2. Mr. Clark, as set forth somewhat fully in our Report, continued to obstruct the company's financing efforts for over a year, until it became necessary under the Security Act to file a new prospectus in November, 1936.

Months of delay in proceeding under the new prospectus for 1936-37 were then occasioned by such incidents as the following:

Early in January, 1937 Mr. Clark resigned as attorney for the Company, and on January 20th he wrote: "It will not be proper for our names to be used on the prospectus in any connection. I will, if necessary, take this matter up direct with the Commission." This meant that the prospectus could not be used, and another attorney had to be secured. Revised prospectus with the new attorney's name on it was printed, and Mr. Clark also blocked that by writing on January 30, 1937:

> "If my name does not appear on the prospectus a full explanation may become necessary and then the lid will be off and things may get out of control."

In order to terminate these serious delays, the

President requested a meeting with the members of Mr. Clark's firm, and such a meeting was held in their office on February 5, 1937. At this meeting Mr. Clark is reported by those present, which included the President of the company, one of the Underwriters and a leading Stockholder, to have made the following statement: "Unless my firm is kept on as attorney on the new prospectus, I will form a Debenture Holders Committee." The forming of this committee would have made future financing by sale of the company's Treasury Stock impossible. Mr. Clark was reinstated as attorney and the prospectus had to be reprinted for the third time.

3. In the Fall of 1937, it was apparent that the necessity for new financing was imperative. All parties interested in the Pioche enterprise were fully agreed on this point. To this end, therefore, meetings were held during the Fall and Winter of 1937. Meetings were held Oct. 13, November 5th, November 21st, December 20th, January 21st and February 19th.

These meetings were variously attended by the following persons: John E. Zimmermann, Percy H. Clark, Albert P. Gerhard, and T. Mitchell Hastings of Philadelphia; Richard E. Dwight and E. O. Bogert of New York; Henry M. Williams, Jr. and Richard K. Baker of Boston; and the President of the Consolidated company.

As a result of these meetings, a Reorganization Agreement embodying the terms of a proposed plan for financing (imperatively needed to save the corporation) was agreed upon by all conferees and

finally drafted in the form as sent out to all Debenture Holders on Jan. 24, 1938.

This agreement embodied the best thought of the representatives of the debenture holders, the representatives of the New Money, and the officers and management of the corporation, and was reportedly signed by the holders of 75% of the Debentures.

Mr. Clark and Mr. Zimmermann had both signed the agreement and had pledged themselves to carry out the necessary steps to have the agreement signed by the debenture holders to make up the required 90%. After 75% had signed, Mr. Clark independently and without due consideration to the interest of the other parties interested in the success of the agreement decided he would not go forward with it.

When asked by certain of the Protective Bondholders Committee why the 1938 financing plan had failed, Mr. Clark made statements verbally and over his signature in a letter dated November 18, 1938 wherein he gave reasons which this Committee has found on investigation to be misleading and incorrect, and he neglected to state the substantial and important reasons for the failure of the plan.

Mr. Clark's reason for dealing with the facts about the 1938 plan in such fashion is for the reader of our Report to decide for himself. This much can be said, however, that Mr. Clark by this time had caused grave damage to the company by his acts, and Mr. Clark apparently thought there might be some claim for damages against him unless he could secure a Release. In any event, as a part of the

price for carrying through the 1938 plan previously agreed to, he demanded for himself and his firm a General Release for all acts during his term of office as attorney for the Company. On legal advice, this demand for a release was not acceded to by the Directors of the Company.

The undersigned Committee can see no reason why the Company should not now be on a profitable earning basis if this 1938 Plan had been allowed by Mr. Clark to go through; on the other hand, we cannot see how the bondholders position would have in any way been benefitted had the Directors been able to accede to Mr. Clark's demand for a release. Mr. Clark wrote the President of the Company a letter which we quote in part as follows:

> "at the time of the delivery of the stock certificates there must be a mutual release between the company and this firm of all outstanding claims down to January 1st, 1938." (Jan. 31, 1938)

On February 11th, 1938 Mr. Clark wrote the President of the Company another letter which is appended in full to our Report, from which we quote the following:

> "I have never been very enthusiastic about the Reorganization Plan but have signed up in the hope that it will be the means of cleaning up back tracks and taking a fresh start." * * *
>
> "Cannot we agree to clean up all of the back tracks at once and at the same time put the

Company on its feet and leave you free to carry out the plans to which you have devoted so many years of your life?"

From this time on no further cooperation was received from Mr. Clark.

4. On May 9th, 1938 there was a letter written to a representative of the New Money. This letter was signed by all three members of the Committee —Mr. Zimmermann, Mr. Gerhard and Mr. Clark. The mildest statement we can make is that this letter was not calculated to encourage any investor.

5. Prior to the suit now pending, Mr. Clark as Chairman of the Debenture Holders Committee sent an auditor to Pioche presumably to make a report covering the operations of the Company after examining all the records. The Pioche Company agreed to cooperate and it had just had its own public auditor make a similar investigation.

Mr. Clark's auditor did not make a complete audit in line with the usual procedure, but did make a report which was subsequently sent to many of the debenture holders.

After correspondence between members of the undersigned Committee and the auditing firm, it was admitted by the latter not only that they did not take the time for full examination at Pioche, but also that they put in their report information which was furnished by Mr. Clark and his Committee.

The undersigned debenture holders were naturally seeking to obtain information as to the operation of the company, as reported to the Clark com-

mittee by the auditor. We were quite surprised to find that the reverse was the case and that a part of the contents of the auditor's report was suggested by Mr. Clark. Hence, the value of the auditor's report is questionable, and it is quite amazing that it should be used as an important reference in the litigation against the company.

This concludes a statement of some of the facts.

Now we wish to express our opinion.

This Committee has reached the conclusion that this line of conduct has prevented the Company from raising funds and that the Company could and would have raised funds had the Directors been allowed to guide its affairs unobstructed by Mr. Clark, and we conclude that but for these acts the Company would be on an operating commercial basis.

We submit that these actions and others not herein mentioned have indicated that Mr. Clark has not acted wisely in respect of the interests of the debenture holders, a large part of whom have turned over their bonds to Mr. Clark for him to act for them and they have in this way given support to him and substance to his threats to coerce the Company.

We are of the opinion that the Clark Committee should have had the auditor's firm, whose report was sent to us, give satisfactory answers to the twelve or more points in his report which we questioned. We still have no satisfactory reply either from the Clark Committee or from the auditor, in response to our specific questions affecting his audit.

Many of you, including members of the Protective Bondholders Committee, are personal friends of Mr. Clark of long standing, and we appreciate the loyalty that such a relationship carries with it. After all it is not friendly to ratify and condone the behavior of a friend that will eventually hurt him. Certainly these acts of Mr. Clark are bound to be harmful to him, as we see it.

Some of Mr. Clark's actions have been nothing short of amazing and we have reluctantly reached the conclusion that these have been inspired by motives which have not been disclosed. Our Committee has made an effort to interest bondholders in reading our former Report, to the end that each bondholder can draw his own conclusions and take such action as he sees fit. Some withdrawals have been filed with Mr. Clark and his committee; other bondholders continue to give the matter consideration; others have indicated that they are in no way interested or that they are leaving the matter entirely in Mr. Clark's hands.

If, after reading this, your conclusion is that you have followed Mr. Clark all along and intend to continue to do so, you will of course take no other action. But on the other hand, if you disapprove of the actions of Mr. Clark, you should write to the Debenture Holders Committee and ask for the return of your bonds. If you do this, and send us a copy of your request, your name will be added to the list of other debenture holders who are unwilling to ratify and approve the actions of Mr. Clark and who wish to be protected from the consequences of such acts. To this end, we have attorneys representing

us who have petitioned the Court to protect our interest in the present litigation.

In conclusion, we again emphasize the fact that the various statements made in our Report and in this letter are based upon a careful study of documentary evidence.

We will ask you to give this prompt consideration as it is important to know your position as soon as possible.

Very truly yours,

Protective Bondholders Committee
/s/ Lawrence R. Lee
Theodore E. Brown
Henry G. Brooks

Acknowledgment of Service attached.

[Endorsed]: Filed May 25, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF FRANCIS G. SHAW
In Opposition to Motion for Summary Judgment and in Support of Motion for Relief Under Rule 56(g) of the Federal Rules of Civil Procedure.

State of Massachusetts,
County of Middlesex—ss.

Before me a Notary Public in and for the State and County aforesaid, this date personally appeared Francis G. Shaw, personally known to me, who being first duly sworn deposes and says:

That he is a resident of the State of Massachu-

setts, engaged in business in the City of Cambridge, and that as a representative of Hartshorn & Walter, Auditors, and in the capacity of auditor and accountant he visited Pioche, Nevada, in July 1943, to attend Stockholders' Meeting of Pioche Mines Consolidated, Inc., called to consider and vote upon a proposed Merger of the above named company with Pioche Mines Company and Nevada Volcano Mines Company, all Nevada corporations, and Affiant was present for the purpose of furnishing the Stockholders' Meeting with a Balance Sheet—which Balance Sheet would show the financial position of the proposed Merged Company if, and when, formed;

That for the purposes of the Merger he audited the books of the Pioche Mines Consolidated, and in order to set forth the liabilities of the proposed Merged Company it was necessary to have definite information from the representatives of the various outstanding debentures as to which debentures were committed to be exchanged, and which were not committed to be exchanged as provided in Settlement Agreement, and therefore would remain as liabilities of the new company after the stockholders had completed the merger;

That there was shown to the Affiant at the meeting a copy of the Settlement Agreement, Clause VII of which provided that the Debenture Holders' Committee would undertake to secure the consents of the holders of debentures not already committed to the Settlement Agreement, whereupon in order to determine what action had been taken thereunder this Affiant communicated with the Debenture Hold-

ers' Committee asking that they set forth the amount of debentures whose consents they had secured;

Affiant further states that Debenture Holders' Committee in lengthy and involved letters evaded directly answering the question which left Affiant without a definite figure to put in his Auditor's Report showing the amount of debts remaining to be paid by the Merged Corporation after the merger, that the situation called for a statement of the amount of debentures which under Clause VII had consented, and the amount which had not consented, to the terms of the settlement;

That in early August, 1943, Affiant was compelled to return to Boston until the confusion following from the failure of the Debenture Holders' Committee to answer questions could be cleared up, shown by the correspondence which passed while he was at the stockholders' meeting, and that after his return to Boston his firm continued the effort to get from the Debenture Holders' Committee a definite figure which he could put in his Auditor's Report, and that he was furnished copies of lengthy correspondence between the Stockholders' Meeting and Fidelity Philadelphia Trust Company and the Debenture Holders' Committee, aiming to get a definite figure that could be set up in an Auditor's Report, which would reflect the number of debentures that would remain outstanding on consummation of the merger;

That at the request of the Stockholders' Meeting the Fidelity Philadelphia Trust Company sent a list

setting forth the names of the Debenture Holders presumed to be committed to the Settlement Agreement, which list was shown to this Affiant, but accompanying the list was a statement from the Trust Company directing that securities were not to be issued in accordance with the list sent;

That a telegram from Percy H. Clark, Chairman of the Debenture Holders' Committee, dated September 25, 1943 (copy of which is filed with Exhibit 38, in an Affidavit of Mr. Richard K. Baker, heretofore filed with this Court) serves to illustrate the confusion which confronted the auditors in their work, wherein Mr. Clark stated:

> "Our committee cannot sign certificate you desire, and I cannot believe Janney will sign such certificate relating to claims of debentures on his list, and other creditors, nor should Auditor certify a balance sheet based on such false certificate."

Affiant further states that he called upon Mr. Janney to state the number of debentures on his list which were committed to be exchanged, and an answer was definitely given which was confirmed by the representatives of debenture holders present at the Stockholders' Meeting who confirmed that their debentures would be exchanged upon consummation of the Merger; that all debentures on Mr. Janney's list were therefore committed (leaving the sum of $1,250.00 debentures definitely outstanding to which sum there remains to be added the debentures not-to-be-exchanged from the group whose

consents were to be solicited by Debenture Holders' Committee);

That further confusion to the auditors arose from the above quoted telegram, because a proper statement of the number of debentures which, under Clause VII, had been committed to the settlement would not need to be a false statement, as suggested in the Clark telegram;

That after the Merger had been voted by Stockholders' Meetings in December, 1943, Affiant's auditing firm attempted through 1944 to prepare a Balance Sheet for the Directors' Meeting, but definite information was not furnished by the Debenture Holders' Committee to the auditors, specifying the amount of the undeposited debentures under Clause VII, who had refused their consents to the Settlement Agreement, and the amount who have consented.

Affiant further states that in the course of his auditing work, from the correspondence shown him between Pioche Mines Consolidated and Fidelity Philadelphia Trust Company, and Debenture Holders' Committee, and in the correspondence with Affiant's auditing firm, nothing could be inferred in answer to this question that was definite enough to justify an auditor in giving a statement of the debentures that would remain outstanding and a liability of the Merged Company,—with the possible exception of a letter from Percy H. Clark, Chairman of the Debenture Holders' Committee replying to our firm's letter of February 10, 1944, which letter this Affiant might have considered definite

excepting it appeared to be in conflict with other of his letters which made it unsatisfactory to Affiant as a proper basis for his reporting the financial condition of the Merged Company;

That as a result this Affiant, to this date, has not made a report to Stockholders' Meeting, nor to the Directors, setting forth the number of the Debentures which might refuse to accept in exchange the new securities, on consummation of the Merger, and that the debentures that will remain outstanding and continue to be an obligation of the Merged Company are still undetermined from the auditing point of view.

Deponent hereto attaches the following Exhibits, marked Exhibits S1, S2, S3, S4, and S5:—

Exhibit S1—Letter September 18, 1943, Percy H. Clark to Hartshorn and Walter. This letter I considered as an evasion.

Exhibit S2—Copy of letter, Percy H. Clark to Richard E. Dwight, attorney for Pioche Mines Consolidated, dated September 16, 1943. This letter I construed as inviting premature action and evasive.

Exhibit S3—Letter, September 25, 1943, Percy H. Clark to Hartshorn and Walter. This letter I construed as gratuitous legal advice given by opposing counsel, as well as evasive and dilatory.

Exhibit S4—Letter October 2, 1943, Percy H. Clark, Chairman Pioche Debenture Holders' Committee to Hartshorn and Walter. This letter I construed as Notice that certain Debenture Holders were being held out, without stating which or how

many, but some were admitted to be not bound by the Settlement Agreement.

Exhibit S5—Letter January 18, 1944, Debenture Holders' Committee to Hartshorn and Walter. This letter gave "further information" as of January 18, 1944, and sets up new conditions said to be contained in assents, agreements and other documents which the letter states "I assume you have seen," but which as Auditor I could not assume I had seen. This letter, the first signed by the Debenture Holders' Committee, would seem to make it impossible for an auditor to state the financial condition of the Merged Company.

/s/ FRANCIS G. SHAW

Subscribed and sworn to before me this 1st day of April, 1949.

[Seal] ANNA F. BUCKLEY,
Notary Public in and for said County and State.

EXHIBIT NO. S1

Clark, Hebard & Spahr
Philadelphia 2

September 18, 1943

Messrs. Hartshorn and Walter
Boston, Mass.

Gentlemen:

You will find enclosed copy of my letter of September 16, 1943 to Mr. Dwight which may give you information you want. I feel very little doubt that all of the outstanding debentures will be turned in under the reorganization plan excepting only the

$500. Munson bond which, I understand, has been lost, provided Mr. Janney turns in all of the bonds he has undertaken to get.

Very truly yours,
/s/ Percy H. Clark

[Printer's Note: Exhibit S2 is a duplicate of Exhibit 31 set out at page 496.]

EXHIBIT NO. S3

Clark, Hebard & Spahr
Philadelphia 2

September 25, 1943

Messrs. Hartshorn and Walter
50 Congress Street, Boston, Mass.

Gentlemen:—

This will acknowledge receipt of your letter of the 22nd which seems to me to be based upon a misapprehension relating to the legal effect of the proposed Pioche merger. You will find an office memorandum enclosed which I sent to Mr. Dwight yesterday, but I have been unable to reach him on the telephone today and have received from Pioche a long night letter, a copy of which I enclose together with copy of my reply. I tried to reach Mr. Shaw by telephone but learned he was out of town until Monday. I expect to be in my office most of the day Monday if you want to discuss this matter with me.

Very truly yours,
/s/ Percy H. Clark.

EXHIBIT NO. S4

Clark, Hebard & Spahr

Philadelphia 2

Hartshorn and Walter October 2, 1943

50 Congress Street, Boston 9, Mass.

Gentlemen:

This will acknowledge receipt of your letter of October 1 addressed to the Pioche Debenture-Holders' Committee. The Committee is in a position to certify that all of the debentures which it represents are committed to accept new securities for old when the merger agreement is ratified by the stockholders and the necessary papers are filed with the Secretary of State of Nevada provided the reorganization is consummated on or before December 31, 1943. I insert the proviso because those debenture holders who have recently deposited their debentures with Fidelity-Philadelphia Trust Company have reserved the right to withdraw in the event the reorganization is not consummated by the date named. Mr. Holden is not yet permitted to discuss business affairs although he is very much better. Mr. Gerhard is out of town today. I will be able to reach him early next week and send you the certificate of the Committee. I suggest you send me by return mail a copy of Mr. Janney's certificate in order that the Committee may make its certificate conform as nearly as may be to the language used by Mr. Janney.

Very truly yours,

/s/ Percy H. Clark

Chairman, Pioche Debenture Holders' Committee.

EXHIBIT NO. S5

Clark, Hebard & Spahr
Philadelphia 2

January 18, 1944

Messrs. Hartshorn & Walter
50 Congress Street, Boston, Mass.

Gentlemen:

Our Committee has received a request from E. G. Woods, Secretary of Pioche Mines Consolidated, Inc. that we send to you a statement giving you the specific number of debentures represented by our Committee which have consented to the Settlement Agreement. Mr. Percy H. Clark has already given you by his letter of August 27, 1943 considerable information concerning the outstanding debentures of Pioche Mines Consolidated, Inc. You will find enclosed herewith copy of letter dated November 22, 1943 addressed by the Committee to Fidelity-Philadelphia Trust Company, a copy of which was forwarded by Fidelity to Pioche Mines Consolidated, Inc. This letter will give you further information concerning the debentures, including the number of debentures deposited with Fidelity as depositary.

The undersigned Committee represents the deposited debentures, all of which have consented to the Settlement Agreement and the Merger Agreement on the terms and conditions set forth in the several agreements, letters, Assent and Agreement to Deposit, Letter of Transmittal and other documents, copies of which are on file with Fidelity-

Philadelphia Trust Company and Pioche Mines Consolidated, Inc. and all of which I assume you have seen. We trust this is the information you require.

Very truly yours,

Pioche Debenture Holders' Committee

By /s/ Percy H. Clark
Albert P. Gerhard

Acknowledgment of Service attached.

[Endorsed]: Filed May 25, 1949.

[Title of District Court and Cause.]

INTERROGATORIES TO BE PROPOUNDED TO FIDELITY-PHILADELPHIA TRUST COMPANY PURSUANT TO RULE 33.

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Defendant, Pioche Mines Consolidated, Inc., proposes the following interrogatories to be answered by Fidelity-Philadelphia Trust Company, one of the Plaintiffs herein, in the manner and within the time as provided in said rules:—

Interrogatory Number One:—When you engaged Percy H. Clark to represent you in this action did you know he had acted as attorney for Pioche Mines Consolidated in all matters concerning the issuance of the debentures, the subject of this action?

Interrogatory Number Two:—When you engaged Percy H. Clark to act for you as attorney in this action did you know he had acted as attorney for Pioche Mines Consolidated, in connection with the

filing of two Prospectii with the Securities Exchange Commission as a step in raising the money to pay off the debentures, the subject of this action?

Interrogatory Number Three:—Do you know that Percy H. Clark had approved, as attorney for the company, the balance sheets and accounts filed with the Securities Exchange Commission Prospectii in October, 1935 and December, 1936?

Interrogatory Number Four:—Was the Clark law firm registered with the Securities Exchange Commission as general counsel of Pioche Mines Consolidated and so noted on all of the Prospectii filed by it with the Securities Commission while he was its attorney?

Interrogatory Number Five:—With what representatives of Pioche Mines Consolidated did you deal in accepting the trust indentures, changes in the trust indentures, and issuing and certifying the securities issued thereunder?

Interrogatory Number Six:—When did Percy H. Clark's employment as attorney for Pioche Mines Consolidated commence and when did it end, and attach all documents evidencing the commencement and termination of his employment as attorney?

Interrogatory Number Seven:—When did Clark's duties as Vice-President of the Pioche Mines Consolidated in connection with the bond issue terminate? Attach copy of letters of his resignation and reply thereto?

Interrogatory Number Eight:—What investigation did you make of the Lieb audit, of Barrow,

Wade, Guthrie & Co., auditors, before you filed this action?

Interrogatory Number Nine:—What investigation do you know, or have you been informed, was made by others of this same Lieb audit before you filed this action, and by whom and when were you informed?

Interrogatory Number Ten:—To your knowledge and information to what extent was the Lieb report circulated, and for what purpose?

Interrogatory Number Eleven:—Was an officer of your corporation being cross examined in the depositions taken on June 4 and 6, 1942, in Mr. Clark's office?

Interrogatory Number Twelve:—Was the examination of this officer completed at the time when a settlement was proposed by Mr. Clark, which caused depositions to be discontinued.

Interrogatory Number Thirteen:—At whose request did you start proceedings against Pioche Mines Consolidated?

Interrogatory Number Fourteen:—Which of your officers read the original complaint before it was filed in this action?

Interrogatory Number Fifteen:—What effort was made to check the truth and accuracy of the original complaint before it was filed?

Interrogatory Number Sixteen:—Which of your officers read the supplemental complaint before it was filed in this action?

Interrogatory Number Seventeen:—What effort

was made to check the truth and accuracy of the supplemental complaint before it was filed?

Interrogatory Number Eighteen:—With what company or companies have you or any of your attorneys negotiated or corresponded in reference to making a long term lease of the Pioche Mines Consolidated properties, and attach copies of any letters or documents pertaining thereto?

Interrogatory Number Nineteen:—In your experience as a Trust Company did you ever have to do with the proceedings under bond issues of a mining company, wherein the mining company charged that its financing had been interfered with by the bondholders, and where the character and integrity of the company and its officers were attacked in papers filed by you as Plaintiff in the Court?

Interrogatory Number Twenty:—Do not such proceedings render future financing of such a company impracticable?

Interrogatory Number Twenty-One:—Do not such proceedings leave the company in a position where a long term lease with a well financed mining company is the only method left for the operation of the properties involved?

Interrogatory Number Twenty-Two:—Did the officers of the Pioche Mines Consolidated take this position at the time of the Settlement Agreement to the effect that none of them would assume the responsibility for any other method of operating the properties except through a lease?

Interrogatory Number Twenty-Three: — From

your knowledge of mining leases is it not a fact that a mining company must be free from litigation and attachment and in a clear position in order to negotiate a lease on terms favorable to the lessor?

Interrogatory Number Twenty-Four:—Would not the most favorable position in which the mining company could make a lease be after the reorganization is completed?

Interrogatory Number Twenty-Five:—State the clause in the Settlement Agreement on which you base your position in demanding that a lease be made before the reorganization is completed?

Interrogatory Number Twenty-Six: — Did you write Pioche Mines Consolidated under date of November 22, 1943, to E. G. Woods, Secretary, in which you said in connection with the new income bonds "when such securities are issued and ready to deliver they shall be delivered to Fidelity-Philadelphia Trust Company"? Attach copy of correspondence.

Interrogatory Number Twenty-Seven:—Did the Pioche Mines Consolidated remit the new income bonds to you in accordance with letter of April 17, 1944, in which Pioche Mines Consolidated said "income bonds, income notes and stock certificates are being sent you under separate cover * * * in accordance with the list received from you, * * * with the exceptions above stated", exceptions being Brown, Lee and Brooks debentures and $40,000 of debentures to be issued to E. W. Clark & Co., with the reasons for not including these debentures?

Interrogatory Number Twenty-Eight:—Do you

assert any right to receive or hold the income bonds sent you other than your acceptance of the income bonds sent you in accordance with the letter from Pioche Mines Consolidated of April 17, 1944?

Interrogatory Number Twenty-Nine:—What reply did you make with reference to the $40,000 E. W. Clark & Co. income bonds being withheld until you could straighten out the bond account?

Interrogatory Number Thirty:—What reply did you make to the letter of April 17, 1944, and attach copy of your reply?

Interrogatory Number Thirty-One:—What effort did you make to clear up the confusion that arose out of the $40,000 bonds requisitioned for E. W. Clark & Co., where the Company's records showed that these bonds were held as collateral, which the company records show were held in part unauthorized. Attach copy of your reply clarifying the confusion in the bond account, created by your handling of the accounts as pointed out by company letter of April 17, 1944?

Interrogatory Number Thirty-Two:—Was your requisition of November 22, 1943 based on an audit of the debenture account?

Interrogatory Number Thirty-Three:—Was the letter of February 27, 1945, from your attorney, Mr. Ringe, to Richard E. Dwight based on the same debenture account as your requisition of November 22, 1943?

Interrogatory Number Thirty-Four:—Did you have correspondence with the Bank of Pioche con-

cerning the new income bonds? Attach copies of this correspondence.

Interrogatory Number Thirty-Five:—Did your attorneys, Thatcher and Woodburn, receive from the stockholders meeting, by R. K. Baker, a form of bond to be issued, asking for their approval of the form?

Interrogatory Number Thirty-Six:—Was a copy sent to your attorney Percy H. Clark?

Interrogatory Number Thirty-Seven:—Did either of your attorneys give notice to Pioche Mines Consolidated objecting to the form of the bond in that it did not recite compliance with the Trust Indenture Act, or did they communicate to Pioche Mines Consolidated any other objection as to the bonds to expedite carrying out the Settlement Agreement?

Interrogatory Number Thirty-Eight:—Did the Company notify your attorneys that they would prepare the bonds in the form sent if they did not hear from your attorneys registering objection?

Interrogatory Number Thirty-Nine:—Did you notify the Pioche Mines Consolidated before the bonds were engraved, written up in the names on the list you sent, registered by the registrar in said names, and transmitted to you by the Bank of Pioche, that you would contend that the Trust Indenture Act applied to the issuance of these bonds?

Interrogatory Number Forty:—Did you not require that the bonds be stamped with Internal Revenue stamps before you communicated with the Pioche Mines Consolidated in relation to the Trust Indenture Act?

Interrogatory Number Forty-One:—Is it not the practice when it is desired to have securities qualified with the Securities Exchange Commission, for the Commission to be approached by, and to deal with, the issuing company, which under the law is required to make the representations?

Interrogatory Number Forty-Two:—Is not such business complicated and delayed when persons without authority from the issuing company go to the Commission with statements that do not conform to the facts?

Interrogatory Number Forty-Three: — Attach copies of all communications between yourself or your attorneys and the Securities Exchange Commission regarding the new income bonds and stock in relation to the Securities Act or the Trust Indenture Act?

Interrogatory Number Forty-Four:—Did the Pioche Mines Consolidated give you notice not to communicate with the Securities Exchange Commission or have your attorneys do so until first there was an agreed statement of facts to be presented to the Commission, so as to avoid misstatements to the Commission which the company would have to assume the burden of clearing up? Attach copies of such notice.

Interrogatory Number Forty-Five:—Did your attorneys or any of them communicate with the Securities Exchange Commission in spite of this warning?

Interrogatory Number Forty-Six:—Was performance of the Settlement Agreement delayed by the

position which the Commission took, based on the statement of facts given them by your attorney?

Interrogatory Number Forty-Seven: — Did the legal department of the Securities Exchange Commission afterwards hand down an opinion that it was not necessary for these bonds to comply with the Trust Indenture Act or the Securities Act, on the ground that it was not a public offering, after the facts were submitted to them by Pioche Mines Consolidated, and their attorney, Mr. Dwight?

Interrogatory Number Forty-Eight:—Was this opinion by the Securities Exchange Commission legal department the same in tenor and effect as the opinion given you by your attorneys Morgan, Lewis & Bockius? Attach copies for contrast.

Interrogatory Number Forty-Nine:—How long a period of time elapsed between your notification to the company that you would take the matter up with the Securities Exchange Commission at 10:00 a.m. the next day, and the opinion of the legal department of the Securities Exchange Commission clearing the bonds and thus permitting performance of the Settlement Agreement to proceed?

Interrogatory Number Fifty:—What advice did you get from your attorneys Morgan, Lewis & Bockius after receiving the opinion from the legal department of the Securities Exchange Commission? Attach copies.

Interrogatory Number Fifty-One:—What act or acts did you perform pursuant to letter from Morgan, Lewis & Bockius of September 19, 1944, and

what did you fail or omit to do that you were advised to do?

Interrogatory Number Fifty-Two:—What effort was made by your attorneys or any of them to have the opinion of the Securities Exchange Commission, which was favorable to the company, reversed?

Interrogatory Number Fifty-Three:—What pecuniary benefit would have resulted to the debenture holders if their efforts to secure a reversal had been successful, and the performance of the Settlement Agreement still further delayed?

Interrogatory Number Fifty-Four: — Which of your officers or attorneys read the Affidavit of Percy H. Clark filed by you in support of motion for Summary Judgment?

Interrogatory Number Fifty-Five:—What investigation was made by you to determine the truth or falsity of the statement contained in that Affidavit?

Interrogatory Number Fifty-Six: — Which of your officers or attorneys read the statement in the Affidavit of Percy H. Clark, page 16, lines 24 to 30, —"The realization that the Creditors' Committee and others did not propose to cooperate with the Committee brought back forcibly to their recollection the reasons why the reorganization of 1938 had not been consummated particularly the failure of John Janney and his companies to furnish important information and of other creditors to come in under the plan."?

Interrogatory Number Fifty-Seven:—What effort was made by you to determine the truth or falsity of this statement?

Interrogatory Number Fifty-Eight:—Before you filed this Affidavit did Percy H. Clark tell you, or were you shown a letter dated January 31, 1938, signed by Percy H. Clark and by him mailed to the President of the company in which he stated,—"It is immaterial to us whether the stock comes from the treasury or from your personal holdings but our claim is against the Pioche Company and at the time of the delivery of the stock certificates there must be a mutual release between the Company and this Firm of all outstanding claims down to January 1, 1938."?

Interrogatory Number Fifty-Nine:—Did Percy Clark show you the letter to the President of the company dated February 11, 1938, in which he said, —"I have never been very enthusiastic about the Reorganization Plan but have signed up in the hope that it will be the means of cleaning up back tracks and taking a fresh start. The position taken by Barringer, et al appeals to me as sound and justified. * * *

"The status of our relations for the last two years has been very disagreeable to me and possibly also to you. It is much better that they should be terminated altogether than that they should continue as they have been. Cannot we agree to clean up all of the back tracks at once and at the same time put the Company on its feet and leave you free to carry out the plans to which you have devoted so many years of your life?"

Interrogatory Number Sixty:—Did Mr. Clark tell you that the Conversion Plan of 1937-38 was first

proposed by Mr. Joseph Clark, second by Mr. Percy Clark and later by Mr. John E. Zimmermann, before it was given consideration by the company?

Interrogatory Number Sixty-One: — Did Mr. Clark tell you that the circular sent out to the Debenture Holders' in January 1938 was not an initial proposal by the company, but was after an agreement had been reached with the principal debenture holders representing a majority of the debentures after many conferences which resulted in a definite agreement, and that the matters in the circular were not originally proposed by the company?

Interrogatory Number Sixty-Two:—With reference to the above quoted statement in Mr. Clark's Affidavit on page 15, and particularly to line 29, wherein he states that the 1938 Plan was not consummated due to the failure of other creditors to come in, and of the company to furnish important information:—

(a) Did Mr. Clark tell you that in excess of 90% of the note holder creditors referred to in his Affidavit had assented to this 1937-38 Conversion Plan?

(b) Did Mr. Clark tell you that after this agreement was made that on the insistence of Mr. Clark these same note holders agreed to some changes which were approved by the entire Debenture Holders' Committee.

(c) Did Mr. Clark tell you that the consents of the note holder creditors were in his files and that copies of them had been sent by him to the Boston Committee, which copies aggregated consents to the 1937-38 Conversion Plan in the sum of $217,668.31?

(d) Did Mr. Clark tell you that the scattered note holders referred to as being not available in Mr. Dwight's letter of May 3, 1938, Exhibit 2-B, referred to a few small note holders aggregating less than $5,000?

(e) Did Mr. Clark tell you that at a meeting held at the suggestion of Mr. Gerhard, a member of the Debenture Holders' Committee, Pioche Mines Consolidated furnished all the information requested by the committee and that Mr. Gerhard accepted the information as satisfactory and complete?

Interrogatory Number Sixty-Three: — Did Mr. Clark tell you that he injected into his Affidavit statements about the "1938 Reorganization Plan" to create the impression that Defendants had failed to carry out their part in the 1937-38 Conversion Plan so as to lay the foundation for a similar false contention in relation to the Settlement Agreement?

Interrogatory Number Sixty-Four: — On what clause of the Settlement Agreement do you stand as a basis for your claim a round-table or closing conference is required?

Interrogatory Number Sixty-Five:—Did you ever know of such a conference being held in settlement under Nevada statutory merger wherein company titles are passed by recording the action of a lawfully held stockholders' meeting with the Secretary of State?

Interrogatory Number Sixty-Six:—At such a closing conference were the called meetings of stockholders of Pioche Mines Consolidated, Nevada Vol-

cano Mines Company and the Pioche Mines Company to be present?

Interrogatory Number Sixty-Seven:—At such a conference would you propose that all stockholders be bound by the proceedings, so that the titles to properties of the three companies would be passed at meeting?

Interrogatory Number Sixty-Eight:—After the titles of the three companies' properties had been passed under the Nevada statute could these titles be recalled if the round-table conference failed to agree as to the performances of the remaining terms?

Interrogatory Number Sixty-Nine: — After the stockholders' approved the merger at the meetings that were held at Pioche as lawfully required, based on the representations made by the Debenture Holders' Committee to the stockholders' meeting, that all on your list were committed, what remained to be concluded by any further conference that was not definitely provided for in the Settlement Agreement?

Interrogatory Number Seventy: — Did Percy Clark tell you that the debenture holders or their representatives were invited to attend both the stockholders' and directors' meetings called for the purpose of consummating the Settlement Agreement?

Interrogatory Number Seventy-One:—Did Percy Clark tell you that the debenture holders and their representatives both failed and refused to attend either meeting at the time the meetings were attempting to complete the settlement agreement?

Interrogatory Number Seventy-Two:—Did Mr. Clark tell you that at these meetings all things that were in the power of all parties to the Settlement Agreement to do were done, excepting what remained to be done by Fidelity-Philadelphia Trust Company and the Debenture Holders' Committee?

Interrogatory Number Seventy-Three:—Did Mr. Clark tell you that in the original negotiations for a settlement on June 6th, 1942, it had to take into consideration as a condition that no negotiations could be held between the Boston creditors and the Debenture Holders' Committee, or Pioche Mines Consolidated and the Debenture Holders' Committee, because of their past experiences?

Interrogatory Number Seventy-Four:—Did Mr. Clark, or any of your attorneys, advise you that if you could bring about a closing conference as part of a Nevada merger, by causing at this conference the dissent of stockholders who under Nevada law may demand cash in payment for their stock, the amount demanded might exceed the provision for cash made in the Settlement Agreement, or the ability of the company to provide, and thereby render the new company insolvent and bring about a forced sale of its properties?

Interrogatory Number Seventy-Five:—After the stockholders have approved the merger and titles to properties have passed, on what basis do you stand in asking for a closing conference?

Interrogatory Number Seventy-Six: — Did Mr. Clark or any other of the Debenture Holders' Committee, or your attorneys tell you that if you could

induce the other parties to the Settlement Agreement to attend a conference that new conditions might be exacted?

Interrogatory Number Seventy-Seven:—Did Marshall S. Morgan, President of your Company, receive a visit from his friend Colonel Wm. Innes Forbes, a Director of the Pioche Mines Consolidated representing the Philadelphia debenture holders on the board, at which time he presented a letter from the Board of Directors of the Pioche Mines Consolidated held in New York in February 14, 1945? Attach copy of this letter and your reply thereto.?

Interrogatory Number Seventy-Eight:—Did you advance the money for the commencement of the action you have brought against the Pioche Mines Consolidated?

Interrogatory Number Seventy-Nine:—Have you advanced to the debenture holders any further money for the prosecution of this action?

Interrogatory Number Eighty:—Did you arrange or assist in arranging the loan from the First National Bank to Percy H. Clark of the $100,000 invested in debentures of Pioche Mines Consolidated?

Respectfully submitted,

/s/ FRANCIS T. CORNISH,
Attorney for Defendant, Pioche Mines Consolidated, Inc.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 25, 1949.

[Title of District Court and Cause.]

REQUESTS BY DEFENDANT, PIOCHE MINES CONSOLIDATED, INC., UNDER RULE 36 FOR PLAINTIFFS TO ADMIT FACTS

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, defendant, Pioche Mines Consolidated, Inc., requests that within ten days after service upon plaintiffs of this request, plaintiffs admit each and all of the following facts:

Admission No. 1—Admit that the directors and stockholders of Pioche Mines Company had not considered the consolidation of the particular properties, or the issuance of debenture bonds, until first proposed by Percy H. Clark and John E. Zimmermann.

Admission No. 2—That the method of financing through sale of debentures was entirely new in Pioche developments and was opposed by the directors of Pioche Mines Company as unsound financing for the reason that company progress had not gone far enough to warrant issuing of debentures.

Admission No. 3—That until October, 1928, the management of Pioche Mines Company had, since the inception of the company, met all of its financial needs for development and operation by the sale of its stock through stockholders' groups and their friends, who had paid for their shares, first at 25c, later at 50c, later at $1.00, later at $1.50, later at $2.50, later at $3.00, later at $4.00, and from 1925

on at $5.00 per share. The stock was never offered through brokers or promoters, and the only remuneration ever paid was direct to the stockholders' groups themselves in the nature of recognizing their expenses and this was often paid in stock contributed from the holdings of other stockholders and not from the Company.

Admission No. 4—That in excess of $800,000.00 had been raised by this method of financing in line with a conservative policy of expansion, exploration and developments, that premature or hasty efforts to go into commercial operation had been avoided and that the reports of engineers and visiting groups of stockholders and their engineers, as well as engineers sent out by the Securities Commission concerned were uniformly favorable and complimentary.

Admission No. 5—That the Directors intended to continue this policy and program, and they believed that it would result in operations and plans being continued on a basis most favorable to the investors in the company.

Admission No. 6—Admit that Percy Clark requested that he be made attorney of Pioche Mines Company and was the only attorney for that Company from 1926 until this suit was filed, and he has never resigned. He also requested that he be made attorney for Pioche Mines Consolidated and was its only attorney from the date of its incorporation. On January 15, 1937 he offered his resignation. His resignation was refused, and the president of the Company stated as a reason for refusing the resig-

nation that in acting as attorney for the debenture holders he would be under duty to disclose to them information which he had gained as attorney for the Company, which he was under a duty to the Company not to disclose.

Admission No. 7—Admit that during 1928 Percy H. Clark visited Pioche in October and stated to the President and other officers and directors of Pioche Mines Company in Pioche that if they and the stockholders would arrange to organize the Pioche Mines Consolidated, a Nevada corporation, to own and operate certain properties which represented a vast area of mineral ground in the Pioche district and authorize an issue of debenture bonds to be subscribed by himself, friends and associates at par, that he would act as attorney for the new company, would perform all of the detailed work necessary, to incorporate it, and to issue the debentures, would supervise its accounting and other details so that the directors and management would not have to give these matters a thought, and could devote their entire time to operating affairs, and that if further financing should prove to be necessary from any cause he would assist in providing it.

Admission No. 8—Admit that John E. Zimmermann at about that time was the head of Day and Zimmermann, which was one of the leading engineering firms in the United States, that he visited Pioche in October, 1928, was present with Mr. Percy H. Clark at meetings with the President of the company, and other directors, and he stated in substance that if the directors and the stockholders of

Pioche Mines Company would arrange to organize the Pioche Mines Consolidated, a Nevada corporation, to own and operate certain properties which represented a vast area of mineral ground in the Pioche district and authorize an issue of debenture bonds to be subscribed by himself, friends and associates at par, he would become a director, would assist in procuring subscriptions to the debenture issue, and that if further financing should prove to be necessary for any reason he would assist in providing it.

Admission No. 9—Admit that Percy H. Clark and John E. Zimmermann together went from Pioche to Salt Lake City in October, 1929, and held conferences there with the other members of the Board, W. Mont Ferry who was managing director of the Silver King Mine, Park City, Utah, and President of the American Silver Producer's Association, and A. C. Milner who was president of the Milner Corporation and a director in the Independent Coal & Coke Co. and in the Utah Iron Ore Co., and made to them the same proposals which they made to the directors in Pioche.

Admission No. 10—Admit that later the directors called for a meeting of stockholders to consider the plan proposed by Percy H. Clark and John E. Zimmermann for the forming of a consolidated company in which the stockholders of the Pioche Mines Company would be given the right to acquire shares in the new company by exchanging their shares in the old company, which new company would be authorized to issue and sell $500,000 of debentures,

and that the notice of this proposal sent out to the stockholders contained the following statement:

> "A visiting group of stockholders have agreed that if this arrangement is effected the cash capital necessary to completely finance the new company and put it in operation will be provided."

and that a true copy of the notice is attached hereto and marked Exhibit Q-1, and also there was sent out a report addressed to the stockholders signed by Percy H. Clark and John E. Zimmermann, as well as R. T. Naylor, a stockholder, dated Oct. 14, 1928, and a counterpart hereof is hereto attached and marked Exhibit Q-2.

Admission No. 11—Admit that the stockholders of Pioche Mines Company approved the organization of Pioche Mines Consolidated and the issuance of $500,000 of debentures by Pioche Mines Consolidated, in reliance upon the above stated representations of Percy H. Clark and John E. Zimmermann.

Admission No. 12—Admit that under date of June 4, 1928, Percy H. Clark, Wm. Innes Forbes, Charles Wheeler, R. T. Naylor and T. Mitchell Hastings, signed a report which was sent out to the stockholders of Pioche Mines Company stating among other things

> "An examination of the books of the Company show that they are well kept which indicates careful management. We believe the company's money has been well and econo-

mically expended. This is indicated by the reports of engineers and others competent to judge that the Mill, which includes the latest designs of machinery and process, could not be reproduced expect at a much greater cost than the actual outlay. The same thing applies to the construction of the aerial tramway and the development of the mines. The whole assembled equipment and development seems to us splendidly adapted to the economic prosecution of the Pioche enterprise."

and that the document attached hereto and marked Exhibit Q-3 is a counterpart of that report, and that the facts stated in the Visitors' Report signed by Percy H. Clark included in Exhibit Q-3 hereto attached are true.

Admission No. 13—Admit that the management of the Pioche Mines Company in 1928 and the management of the Pioche Mines Consolidated at the time of the Lieb report were the same, except that Percy H. Clark, as attorney for the company, had assumed responsibility for all details in the formation of the Pioche Mines Consolidated, including its accounts. Mr. Clark approved the balance sheets that were filed with the Securities Exchange Commission in 1935 and again in 1936. This was an audited balance sheet where the certificate of the auditor Dewey O. Simon was attached to the balance sheet when filed with the Securities Exchange Commission with Mr. Clark's approval as attorney for the company.

Admission No. 14—Admit that the accounting practices and condition of the accounts at the time of the Lieb report was a part of the management of company affairs within the scope of the work of Percy H. Clark, who had invited himself to be appointed attorney for the company and assumed the role of supervising the accounts, a part of which was the furnishing of the opening entries to the company accountant.

Admission No. 15—Admit that in 1928 Percy Clark formed in his mind the intent to be made attorney for Pioche Mines Consolidated so that he could have control of and direct certain of its business that required legal direction for the purpose of complicating and confusing the plans, records and proceedings of the company, and intended thereafter to use the conditions he had neglected or created so as to obstruct the necessary financing of the company and in any other way he could prevent the operation and development of its properties and business.

That he also intended to occupy the position of company attorney so that he would be the only attorney familiar with the details of its legal matters, and he intended to suddenly resign and file suit against the company, making it necessary that a new attorney be found to defend the company who could not possibly become familiar with the complications Percy Clark had created and intended to stigmatize the company and its directors by misrepresenting his complicated situations so they would

appear of a different character from the true facts, and also to accuse the company of delay while a new attorney was preparing himself to protect the company from the situation Percy Clark had created.

Admission No. 16—Admit that Percy Clark became the attorney for Pioche Mines Company in 1926, and continued as attorney for that company, and had never resigned up to the merger of that company with Pioche Mines Consolidated in 1943. That he was attorney for Pioche Mines Company when he advised and recommended a reorganization by forming the Pioche Mines Consolidated, which would authorize an issue of debentures, to be by him and John E. Zimmermann sold to their clients, friends and associates, as a means of financing an operating fund to put the properties of the Pioche Mines Consolidated into operation. That in recommending this plan he offered to relieve the management of Pioche Mines Company of all detail connected with the reorganization, the details relating to the forming of Pioche Mines Consolidated, the issuance of its debentures, including the examination of its titles, and incident accounting problems.

That Percy Clark represented to the Directors that his firm was very familiar with reorganizations and recapitalization of companies, and the management would not have to give the matters assumed by him a thought. That while Percy Clark was in Pioche in October, 1928 working out the details of forming the new company, and while he was the only attorney for that Company, he visited the office

of the President, Mr. Janney, and presented to him a document, asked him to sign it, and said there was need for him to sign it; that a conversation ensued in which the President of Pioche Mines Company objected to signing the paper, and said it would be an acknowledgment by Pioche Mines Company of a debt which it did not owe, and showed Percy Clark a resolution of the Board of Directors of Pioche Mines Company of September 12, 1923 which governed the transaction referred to, a copy of which resolution is as follows:

> "Resolved, that the members of the Exploration Syndicate be requested to loan or advance shares to the Company to be sold and provide by such sale funds to carry through the Company's plans, with the understanding that the position of control, if thus surrendered by the Exploration Syndicate may later be reinstated by a reorganization and return of the shares so advanced."

and stated to Mr. Clark that by the terms of the resolution the item $380,826.94 was not a loan to the Company to be paid in cash, but a donation to the Company of cash which was to be repaid at some future time by means of reorganization by restoring the stock control of the group of stockholders who advanced the shares, and that the completion of the reorganization then being worked out, under which the control would be reinstated, would wipe out any obligation.

Percy Clark stated that he wanted some paper so

that the stockholders who had advanced the shares could not assert the obligation later, and Mr. Janney then suggested that could be covered by signing a quitclaim giving the new company an assignment of such rights as would remain after the new company was organized, that Mr. Clark agreed that the words "Any and all claims which I may have" would be a satisfactory substitution in the assignment, and with this change the paper was signed by Mr. Janney, and as so corrected a copy of the pertinent portion is attached hereto and marked "Exhibit Q-4".

Admission No. 17—Admit that the allegations in the complaint, page 20 that certain loans made by the company were on a basis of preferring said loans to a debt due Pioche Mines Consolidated of $380,826.94, are based upon Percy Clark's false statement, unsupported by documentary evidence.

That no such obligation ever existed involving a debt of $380,826.94 payable in cash, but this referred to the resolution of the Board of Directors of Pioche Mines Company of September 12, 1923, under which this debt had been fully paid and discharged by delivery of stock upon the incorporation of Pioche Mines Consolidated, all of which was fully known to Percy Clark, he being the attorney for both companies, and was fully set forth in notice to Stockholders dated December 21, 1928 (Exhibit Q-1).

That at the time of qualifying the shares of Pioche Mines Consolidated with the Securities Exchange Commission the assignment attached hereto

and marked Exhibit Q-4 was considered by the board of directors and by their vote declared that no asset was represented by this assignment and that a copy of the resolution is attached hereto and marked Exhibit Q-5.

That thereafter the books of Pioche Mines Consolidated were corrected to eliminate this $380,826.94 set up in the accounts by Percy Clark as an asset, and audited; that the auditor's statement omitting this asset was filed with the Securities Exchange Commission with the approval of Percy Clark as a step for qualifying 200,000 of the company's treasury shares for public sale at $5.00 per share.

That all of this occurred before the resolution mentioned in the complaint was passed, and Percy Clark had full knowledge of this state of the record of Pioche Mines Consolidated when he signed and verified the original complaint filed herein.

Admission No. 18—Admit that the purpose of Lieb in preparing and of Clark in securing the Lieb report was not to secure an audit, and not to secure accurate and complete information as to the financial condition of the company, but to misrepresent the financial condition of the company and to slander and defame its officers and its management and render difficult the task of properly defending the company, and was used for that purpose and for the purpose of inducing debenture holders not in the Clark group to join their group of Debenture Holders and to authorize Fidelity-Philadelphia Trust Company to institute this action.

Admission No. 19—Admit that Mr. Lieb's report was not based solely upon the books and records of the company, but also incorporated information that had been given him by plaintiffs' attorney of record in this case, and the other members of the debenture holders' committee, and the words "other officers" in the last line of the portion of the report quoted on page 7 of the Affidavit of Percy H. Clark refers, among others, to the said Percy H. Clark.

Admission No. 20—Admit that the Debenture Holders' Committee gave Mr. Lieb information concerning the affairs of the company, and that Mr. Lieb found after examining the records of the company that the information given by the Committee was untrue, and the contrary was confirmed by the company records; that Mr. Lieb reported from Pioche to the Debenture Holders' Committee that the books, records and accounts contradicted the information given him by the Committee, and the Committee then ordered him not to complete his audit and to return to Philadelphia.

Admission No. 21—Admit that Mr. Lieb remained in Pioche for two weeks, and without making a thorough audit returned to Philadelphia on the order of Debenture Holders' Committee; that while he was in Pioche no information was withheld from him, and all of his questions were answered fully and completely to his satisfaction, which he acknowledged. Among items made available to Mr. Lieb were all cancelled checks, that had been issued by the company since its inception, and all bank statements showing all cash deposited with the com-

pany, together with the cash books showing the source of all deposits, all stock records, records of Minutes of Directors, all books relating to the stock transactions and all other affairs of the company.

Admission No. 22—Admit that when Mr. Lieb came to Pioche, Mr. E. G. Woods, Secretary of Pioche Mines Consolidated, asked him if he had audited the original records of the debenture account kept by Percy H. Clark in Philadelphia, and informed him that the records in the Company office in Pioche were compiled from data furnished by Percy H. Clark, and that he could not arrive at a positive determination as to the correctness of the account; that Mr. Lieb said the records in Pioche were inadequate and from these accounts he could not make a true determination, and that it would be necessary to audit the debenture records kept by Percy H. Clark in Philadelphia, and that he would audit Percy H. Clark's account when he returned to Philadelphia; that the original entries in the debenture account were kept by Percy H. Clark in Philadelphia; that Mr. Lieb did not audit the original debenture account and the figure in the balance sheet attached to his report showing $602,050 of debentures outstanding is an unaudited and inaccurate figure, and was inserted in the Lieb report by him for the purpose of continuing existing confusion in the debenture account, and Mr. Lieb purposely avoided reference in his report to this confusion.

Admission No. 23—Admit that on the day before Mr. Lieb left Pioche he stated to the President and Secretary of Pioche Mines Consolidated that he had not completed an audit and did not have time

to do so, and the President and Secretary both asked that he make immediate arrangements to either complete the audit himself or have some other member of his firm do so; that before leaving he asked Mr. Janney to give him the key to Mr. Janney's personal safe deposit box in Salt Lake City, Utah, so he, Mr. Lieb, could inspect the shares of Volcano Mines Company stock held in the Volcano Trust and referred to on page 17 of the Lieb report; that Mr. Janney offered to accompany Mr. Lieb to Salt Lake City and exhibit said Volcano Mines Company shares and Mr. Lieb declined the offer.

Admission No. 24—Admit that thereafter on November 5, 1939 the Secretary of the company exhibited said certificates of Volcano stock to a Notary Public in and for Lincoln County, Nevada, and there was executed the Affidavit and certificate of notary, a copy of which is attached hereto and marked Exhibit Q-6, and a copy was sent to Mr. Lieb.

Admission No. 25—Admit that in filing the Lieb report in support of the Motion for Summary Judgment, Fidelity - Philadelphia Trust Company intended to represent to the Court that the Lieb report was a proper audit made for the purpose of reflecting the true status of the company's accounts and records, and thereby to deceive and mislead the court.

Admission No. 26—Admit that the Lieb report was not based upon an Audit of the accounts of Pioche Mines Consolidated, but is an inaccurate, de-

fective report intended to mislead and deceive debenture holders and others, and that no effort was made to correct errors, misstatements and omissions in the Lieb report either by Fidelity-Philadelphia Trust Company, by the Debenture Holders' Committee or by Barrow, Wade and Guthrie, after errors in the report were brought to their attention, nor to communicate such corrections to those to whom the report had been circulated in soliciting authority to Fidelity-Philadelphia Trust Company to bring this action.

Admission No. 27—Admit that the officers of the company had worked without salary or other compensation for their services in financing and managing the company's affairs as an important policy of the corporation in assuring the success of its financing; that reference to this was omitted in the Lieb report; that the Debenture Holders' Committee instructed him to omit this reference. That the Boston Committee called this omission to Lieb's attention, but without any correction being made.

Admission No. 28—Admit that Mr. Lieb came to Pioche in October, 1939, after the company's books had been amended to reflect the changes necessary to remove the capital surplus entries and conform them to Securities Exchange Commission requirements; that a full audit of the company's books immediately thereafter had been made by Dewey O. Simon, who was a competent public accountant of high standing and wide experience in mining company audits; that Mr. Lieb had never made a mining company audit before coming to Pioche.

Admission No. 29—Admit that this audit of Simon fully reflected the true state of the company's accounts. A copy of the Simon audit was left with Joseph S. Clark, senior member of the firm which is attorney of record for Fidelity-Philadelphia Trust Company in this action, for examination and study and a copy was left with Robert F. Holden, a member of the Debenture Holders' Committee, for examination and study. Dewey O. Simon found and reported on the items which Lieb in his report stated could not be obtained from the company's books.

Admission No. 30—Admit that the cause of delay in auditor examining books and records at Pioche is not correctly stated, page 6, line 30, to page 7, line 15, in Affidavit of Percy H. Clark; that the delay was due to delay in receipt of opening entries, to correct accounting recommendations made by the company attorney, and to enable an audit to be made by the company auditor.

Admission No. 31—Admit that Percy H. Clark delayed in furnishing proper opening entries and the accounts were kept on cards in the interim. Percy Clark insisted on putting in a capital surplus account when opening entries were made; that the Directors of the company and the management objected to the capital surplus entry; that the discussion between Clark and the company occasioned delay in properly opening the accounts of the new company.

Admission No. 32—Admit that on August 25, 1939, Pioche Mines Consolidated mailed a letter,

signed by the President and Secretary of the company to the Bondholders' Committee which letter, in due course of post, was received by the Bondholders' Committee; that a true copy of which is attached hereto and marked Exhibit Q-7, and that all of the facts set forth in said letter are true;

Admission No. 33—Admit that the death of the company accountant, Mr. W. W. Grubbs, left the detailed accounting adjusting to Securities Exchange Commission requirements incomplete and the work was being completed in the summer of 1939; that it was impracticable to undertake a thorough audit before the work was completed, and that these facts were told to Percy Clark at the meeting on May 9, 1939, and known to him at the time he made the Affidavit in support of Summary Judgment.

Admission No. 34—Admit that it was explained to Mr. Clark at the meeting of May 9, 1939, wherein an audit of company accounts was proposed by Mr. Clark, that a great deal of detailed bookkeeping work would be required to make the necessary adjusting entries in the journal and in the accounts, to complete the Securities Exchange Commission demand, which were in process of being made at the time the Debenture Holders' Committee asked for an audit; that Mr. Janney stated to the meeting that the Debenture Holders' Committee could have all the audits they wanted, and by any auditor they might select, but that an audit must wait until the books were posted up to date and until the company had first had its own audit.

Admission No. 35—Admit that the requirements

of the Securities Exchange Commission were in accord with the opinion and recommendation, expressed to Mr. Clark, by directors and management of Pioche Mines Consolidated, as well as its accountant at the time of Clark's insistance on the capital surplus entry.

Admission No. 36—Admit that statement in Percy Clark's Affidavit starting on page 4, line 14, down to line 24, was made for the purpose of deceiving the court, and to induce the court to believe that Pioche Mines Consolidated was asking concessions from the Debenture Holders; that the true facts are:

That the negotiations started in July 1937 and that John E. Zimmermann (who became chairman of the committee under the proposed plan) visited the office of John Janney, President of the Consolidated Company, in New York, and stated that debenture holders desired to work out a plan to convert their debentures into stock under their option to convert, provided in the Debenture contract; that prior to that Percy H. Clark proposed a plan whereunder the debentures would be converted into stock, and previously that same year Joseph S. Clark had proposed a plan to the same purpose; that Mr. Janney declined to negotiate the proposals of Joseph Clark or Percy Clark for the stated reason that negotiations would suspend the Company's financing, or contravene the Securities Exchange Commission records under which company financing was being conducted, and for the further reason that such negotiations might extend

over a period of time that would be disastrous to the company's financing and render the company insolvent.

Admission No. 37—Admit that Janney stated to Zimmermann that he would hold conferences with Zimmermann to see if a plan could be worked out; that after Zimmermann returned from his vacation a plan was worked out under which $250,000 of new money would be provided and the debentures would be converted into stock.

Admission No. 38—Admit that after Janney and Zimmermann had concluded their agreement Percy Clark was called into the conference and asked if the proposed plan would be agreeable to him and his associates. Later conferences were held with Zimmermann, Janney, Richard E. Dwight of New York, Henry M. Williams and Richard K. Baker of Boston, and Percy Clark, in which Mr. Dwight represented those who were prepared to provide the new money.

Admission No. 39—Admit that the statement in Clark's affidavit "In January 1938 Pioche Consolidated proposed to the stockholders a plan of reorganization" refers to a circular letter; that the circular letter was sent out by the Company on January 24, 1938 to the Debenture Holders and not to the Stockholders; that the copy attached hereto as Exhibit Q-8 is a true copy thereof; that the notice, the plan and the Balance sheet as of November 30, 1937, included in the notice sent out were worked out and approved by Percy Clark and the other conferees. That the 90% required to make the

plan effective was a figure worked out at the conference; that it was first proposed to make the figure 80% based on the assumption that the Trustees of Estates holding Debentures would not assent until after the plan was consummated; that Percy Clark stated at the meeting to Janney, Dwight and Zimmermann that he had interviewed nearly all of Philadelphia Debenture Holders and Trustees and had gotten favorable responses from them and read from a memorandum he had in his pocket containing a list of the Trustees, and stated that practically all of the debenture holders and most of the Trustees could be expected to sign any agreement that he and Zimmermann would sign; that at the end of this reading of the list by Mr. Clark it was agreed by those present that 90% of the debenture holders should sign to make the contract operative, and agreed the amount could be reduced from 90% to 85% if fewer of the trustees than expected assented to the plan.

Admission No. 40—Admit that the Barringer referred to in the Clark Affidavit as dissenting represented less than 2% of the total Debentures outstanding; that the Debenture Holders' Committee made no effort to reduce the number of debentures required from 90% to 85%.

Admission No. 41—Admit that on January 31, 1938, seven days after the date of the circular, Percy Clark demanded a general release to his law firm in a letter of that date wherein he said "there must be a mutual release between the company and this firm of all outstanding claims down to January 31,

1938," and a true copy of that letter is hereto attached and marked Exhibit Q-9.

Admission No. 42—Admit that on February 11, 1938, Mr. Clark addressed another letter to the President of the Company in which he said "I have never been very enthusiastic about the Reorganization Plan but have signed up in the hope that it will be the means of cleaning up back tracks and taking a fresh start. The position taken by Barringer, et al. appeals to me as sound and justified. * * *

"Cannot we agree to clean up all of the back tracks at once and at the same time put the Company on its feet and leave you free to carry out the plans to which you have devoted so many years of your life?" that a true copy of that letter is hereto attached, marked Exhibit Q-10.

Admission No. 43—Admit that after Percy Clark failed to secure a general release for the Clark law firm he made no effort in good faith to secure the additional signatures to the agreement, which had been promised when negotiations were begun, and he devoted his efforts to discourage the plan and especially to discourage the new money as is evidenced by letter addressed to Richard E. Dwight, under date of May 9, 1938, signed by the debenture holders' committee, attached to the Affidavit of Clark as Exhibit 3.

Admission No. 44—Admit that Richard E. Dwight at a later conference with Zimmermann, Clark and Baker stated that he could see how the new money would be particular and raise such questions, but

the debenture holders had their investment in, which was being benefitted by the plan, and should not be delaying the plan by the questions raised in the letter of May 9, and that Zimmermann asked Clark to withdraw his demand for a release and that Clark refused; that Zimmermann then asked Clark to discuss the matter of a release with his partners; that the demand for a release was not afterwards withdrawn.

Admission No. 45—Admit that at no time was a list ever furnished Pioche Mines Consolidated of the debenture holders who had refused to join the plan, and no opportunity thus given to solicit their agreement with the plan; that a request for such information was made and that both Williams and Dwight offered to assist by interviewing those who had not signed up, and their offer was refused.

Admission No. 46—Admit that on December 8, 1938, a letter was sent by Janney to Zimmermann, Debenture Holder, in which the questions were asked, which bondholders have refused, what specific objections did they raise, and what was the answer of the Debenture Holders' Committee to the objections; that attached hereto as Exhibit Q-11 is a true copy of said letter, that this letter was never answered by any member of the Debenture Holders' Committee, that this was the last communication between the Debenture Holders' Committee and the company concerning the Conversion Plan of 1937-38.

Admission No. 47—Admit that the financing of the company was suspended between September,

1937, and December, 1938, and that it was not practicable to sell stock under Securities Exchange Commission registration while such negotiations were pending; that the sale of shares under a contract for financing in Boston was suspended relying upon the good faith of the Debenture Holders to comply with their representations made at the commencement of the negotiations.

Admission No. 48—Admit that soon after the negotiations got underway $50,000 of new money was provided by John Janney to tide the company over the period of delay in the negotiations and that the Debenture Holders' Committee had knowledge that this $50,000 was furnished to the company based on their representations as to the plan.

Admission No. 49—Admit that the letter of Albert P. Gerhard dated February 4, 1938, attached as Exhibit I-B to the Clark Affidavit was answered by Janney, and the February 19th meeting followed in New York, and that the statements of what happened at this meeting contained in the Affidavit of T. Mitchell Hastings on file herein are true.

Admission No. 50—Admit Percy Clark falsely reported to Zimmermann, chairman of the committee, that Janney was withholding information and did not answer Gerhard's letter of February 4, 1938.

Admission No. 51—Admit that plan was used by Debenture Holders to tie up the company affairs and involve it in negotiations which were intended to prevent the company from rebuilding its mill and carrying forward its agreed plan of operation.

Admission No. 52—Admit that a Balance sheet

as of November 30, 1937 was sent out with the letter of January 24, 1938, and that John Janney wrote two letters to John E. Zimmermann, and that true copies of said letters are attached hereto and marked respectively, Letter June 15, 1938 Exhibit Q-12, letter June 17, 1938 Exhibit Q-13, and that all of the facts stated in each of said letters are true, that Zimmermann, Chairman of the Committee, requested no further information and that he admitted all the information was furnished which was desired by him except for the answer to the Gerhard letter of February 4th, 1938; admit that at the meeting of February 1938 John Janney answered all questions propounded to him by Albert P. Gerhard, and furnished Albert P. Gerhard with all information requested by him, and that Albert P. Gerhard stated to the meeting that he was satisfied with the information given and that it met the requirements of Debenture Holders' Committee.

Admission No. 53—Admit that Percy H. Clark appeared at conferences in 1937 and 1938 in which this plan was negotiated, and intended by his participation, and by statements made by him at said conferences, to lead Pioche Mines Consolidated and representatives of the new money to believe that any plan which he and John Zimmermann would sign would be accepted by enough of the Debenture Holders to put the plan into operation; that this representation was made for the purpose of inducing Pioche Mines Consolidated to fail to provide for payment of interest coupons attached to the debentures which by their terms matured in October,

1937, January and April 1938, and thereafter intended to prevent the plan from becoming operative and to induce the debenture holders to request Fidelity-Philadelphia Trust Company to declare the debentures in default and commence this action against Pioche Mines Consolidated, and also intended to interfere with sales of the company's treasury stock, which shares had fully qualified with the Securities and Exchange Commission before negotiations had commenced; that the October, 1937 installment of interest on the Debentures was paid in spite of the Company being held up in these negotiations.

Admission No. 54—Admit that the purpose of Mr. Clark in making the statement on page 8, 9 and 10 in his Affidavit was to give the Court to believe the facts to be different from the following and that the following facts are true: That the western manager of the U. S. Smelting Company who was the Mr. Hunt named in the Clark Affidavit first approached Mr. A. C. Milner of Salt Lake City, who was one of the Directors of the Pioche Mines Consolidated, and said he would like to help settle the law suit involving the Pioche Mines Consolidated, and that his company would be interested in putting up the money to equip and operate the properties. Mr. Milner reported this to the President of the Company, Mr. Janney, who was then in New York, who replied to Mr. Milner that he did not consider the time appropriate for any such negotiations. That following this Mr. Janney received a long distance call from Mr. Hunt in the Salt Lake

office of the U. S. Smelting Company who stated that he felt sure he could be helpful in settling the controversy with the Fidelity-Philadelphia Trust Company. Mr. Janney told Mr. Hunt that the various parties in the action pending in Nevada would have to be consulted and participate in any such negotiations as he proffered. Whereupon Mr. Janney reported the situation to Mr. Hawkins, Company attorney in Reno, and suggested that if the negotiations were through Percy Clark delay would result, who replied later that he had discussed the matter with Mr. Thatcher, attorney for the Fidelity-Philadelphia Trust Co. and that Mr. Thatcher advised we take the matter up with Mr. Joseph S. Clark, and that after Mr. Thatcher and Mr. Hawkins so advised Mr. Janney wrote the letter to Mr. Joseph S. Clark mentioned in Mr. Clark's Affidavit. That there was no need for any letter to the Clark law firm before this communication.

Admission No. 55—Admit that the negotiations referred to page 9, line 21, as follows: "Negotiations continued until spring of 1942 when a stalemate was reached and negotiations discontinued" were not broken up by a stalemate but by letters from Percy H. Clark to the Boston Committee of Stockholders and Creditors repudiating an agreement reached in Boston on December 16, 1941 between Joseph S. Clark representing the Debenture Holders' Committee and the Boston Committee, which agreement was reduced to writing and approved by Joseph S. Clark and the Boston Committee, and is incorporated in Letter December 17, 1941, Augustus

L. Putnam to Joseph S. Clark, attached hereto and marked Exhibit Q-14.

Admission No. 56—Admit that the agreement was repudiated in a letter from Percy Clark to Augustus L. Putnam, chairman of the Boston Committee, dated February 11, 1942 with the statement that Joseph S. Clark did not have adequate authority, which was not in accord with the representations to the Boston Committee on which negotiations had been conducted although they understood the agreement was tentative.

Admission No. 57—Admit that Pioche Mines Consolidated proceeded with all speed and diligence to prepare its pleadings, motions and briefs filed in this action which progressed from the filing of the action in 1940 to the settlement in 1942 as rapidly as was possible in the circumstances, and that practically all of the delay since the initiation of this action has been due to plaintiffs.

Admission No. 58—Admit that the portion of the Affidavit of Percy H. Clark page 10, lines 14 to 21 inclusive, was stated by Percy H. Clark for the purpose of concealing from the court the true facts, and that the true facts are: That the deposition of Percy H. Clark was being taken on June 6, 1942, and while he was being cross-examined by counsel for defendants he became red in the face and interrupted the taking of his deposition with the statement "a settlement could be reached in twenty minutes if John would only talk to me like he used to do"; that by "John" he referred to John Janney, president of defendant corporations; that none of

the attorneys for the parties present had mentioned a settlement until Clark interrupted the proceedings; that John Janney refused to discuss settlement except as stated by him to his attorney that if agreement was reached that night which bound the debenture holders without further negotiation, that he would submit the proposal to his associates, the creditors and stockholders with the option to accept or reject the agreement, and after so advising his attorneys, the attorneys for the respective parties entered a conference with Percy H. Clark to reach a settlement; that John Janney was not present at the discussion in said conference, but was called in after a definite offer was ready for proposal.

Admission Number 59—Admit that at no time during the conferences regarding the settlement agreement from June 6, 1942 until July 7, 1942, was the matter of a lease of the properties of the reorganized companies discussed, and that the first mention of such lease was made by Percy H. Clark on July 7, 1942; that Percy H. Clark then mentioned the matter for the first time and refused to execute any agreement unless the execution by the reorganized company of a lease was made a condition of the settlement; that immediately after his proposal of a lease was rejected, Percy H. Clark left the conference without signing any agreement; that on July 7, 1942 the Dwight law firm addressed a letter to Percy H. Clark, and a true copy of the letter so sent is attached to the Affidavit of Percy H. Clark and marked Exhibit 8a thereto; that Percy

H. Clark made no reply to that portion of said letter which reads as follows:

"I must say that your suggestion that the reorganization would not be consummated until after a lease was entered into came as a distinct surprise to me. No mention of such a condition was made at any conference, nor was such a suggestion included in any of your correspondence addressed to the previous drafts of agreement. This is indeed a strange situation, in view of the fact that you now make your suggestion a principal point of the agreement. If we are in fact negotiating in good faith in an effort to reach a settlement, the suggestion made in the enclosed drafts should meet with your approval. If, on the other hand, we are not in fact making an effort to settle this litigation but are simply seeking to postpone the issue, then I believe that there is no alternative but to resume the litigation at once and carry it to an ultimate conclusion, whatever that conclusion may be."

Admission No. 60—Admit that the Debenture Holders' Committee referred to in VII of the Settlement Agreement, a copy of which is attached to the complaint, and each and every member thereof, to-wit, Percy H. Clark, Robert F. Holden and Albert P. Gerhard, made no effort to secure the consent of the non-deposited Debenture Holders to the Settlement Agreement until May 9, 1943.

Admission No. 61—Admit that prior to May 9, 1943 Debenture Holders' Committee gave as an excuse for not securing additional consents to the Settlement Agreement that they needed further in-

formation necessary to fully inform the debenture holders; that this excuse was fictitious; that Richard E. Dwight wrote a letter to Percy H. Clark under date of May 8, 1943 informing him that he already had all necessary information, and that said letter was received by Percy H. Clark, and that a copy of said letter is attached hereto and marked Exhibit Q-15; that after May 9, 1943 the Debenture Holders' Committee proceeded to obtain the assents of the remaining outstanding debentures without further information.

Admission No. 62—Admit that Robert F. Holden was selected by agreement from among the debenture holders to act as a director, and was elected to the Board of Directors of Pioche Mines Consolidated; that repeated requests were made by the Company to have Holden or some substitute, or other representative in his place, attend the meetings of the Board of Directors of Pioche Mines Consolidated called and held during 1944 for the purpose of performing the Settlement Agreement and Merger; that adjournment was made to permit such attendance and that neither Holden nor any other representative of Debenture Holders attended any of the meetings in 1944.

Admission No. 63—Admit that the Debenture Holders' Committee were repeatedly asked to attend the stockholders' meeting to facilitate the consummation of the Settlement Agreement and Merger and that they failed and refused to attend.

Admission No. 64—Admit that the Debenture Holders' Committee intended to withhold the con-

sents of the holders of the non deposited debentures in the principal amount of $67,100 referred to in Paragraph 7 of the Settlement Agreement for the purpose of exacting new terms to the Settlement Agreement, which had not before been agreed to; that the consents of all of the $19,700 of debentures, except $1,250, which consents to the Settlement Agreement were to be secured by defendants were secured and their Debentures were delivered to Pioche Mines Consolidated at the time of Stockholders' Meeting in exchange for new income bonds of the same face value, and that the holders of debentures of a principal sum of $1,250 cannot be found.

Admission No. 65—Admit that defendant Pioche Mines Consolidated has requested Fidelity-Philadelphia Trust Company to have made an audit of the debenture account kept by Percy H. Clark in Philadelphia, and that Fidelity-Philadelphia Trust Company has failed and refused to have said debenture account audited.

Admission No. 66—Admit that Fidelity-Philadelphia Trust Company intended by its requisition dated November 22, 1943 to obtain possession from Pioche Mines Consolidated of new income bonds, and intended after obtaining said new income bonds to retain said bonds and refuse to exchange said bonds for debentures until Pioche Mines Consolidated had done and performed acts and deeds not specified, or intended, within the terms and provisions of the Settlement Agreement, and intended, within the terms and provisions of the Settlement

Agreement, and intended by its insistence upon such performance to prevent securing an advantageous lease of the property to prevent the sale of preference notes, to prevent the raising of cash necessary to perform the Settlement Agreement, and to hold inoperative the properties of Pioche Mines Consolidated; that they cited no part of the Settlement Agreement which gave them the right to require delivery to them of said new Income Bonds, that they intended to get possession of the said bonds and keep them in their possession while they made demands at the instance and direction of the Debenture Holders' Committee.

Admission No. 67—Admit that upon receiving letter dated April 17, 1944 from Pioche Mines Consolidated and the securities therein described, Fidelity-Philadelphia Trust Company made no answer to said letter, and did not acknowledge receipt of said securities, but instead obtained an opinion from its counsel, Morgan, Lewis & Bockius, that the securities violated the Trust Indenture Act, that Fidelity-Philadelphia Trust Company delivered a copy thereof to their attorney of record, Percy H. Clark, who with Albert Gerhard after receiving said opinion visited the Securities Exchange Commission offices and, without first agreeing, as they were requested to do, with Pioche Mines Consolidated on a statement of the facts to present to said Securities Commission, brought about a situation of confusion and delay; That they presented to the Securities Commission a statement of facts which failed to reveal that the new issue of securi-

ties was not a public offering, but an issue in settlement of litigation and therefore not subject to the Securities Act or to the Trust Indenture act; that Fidelity-Philadelphia Trust Company has never furnished Pioche Mines Consolidated with a copy of any statement of facts which they or their attorneys of record submitted orally or in writing to the Securities Exchange Commission, in their negotiations with the Securities Exchange Commission relative Pioche securities being issued in violation of Securities Act and Trust Indenture Act.

Admission No. 68—Admit that later under date of September 19, 1944 after legal opinion from the Securities Exchange Commission held that securities issued under Settlement Agreement were not a public offering (Exhibit Three to Answer to Supplemental Complaint) Fidelity - Philadelphia Trust Company received from their attorneys Morgan, Lewis & Bockius legal advice to either within ten days deliver the bonds according to the instructions from the Pioche Mines Consolidated in exchange for the old debentures or to resign their position as depositary, copy of which letter is attached to the Affidavit of John Janney in support of Motion for deposit in Court and marked DM-11; That Fidelity Philadelphia Trust Company after receipt of said legal advice failed to exchange the securities in said letter mentioned, and failed to withdraw from its position as depositary; failed to return said income bonds or any of them to the Pioche Mines Consolidated, and acted upon the direction of the Debenture Holders' Committee; That Fidelity-Phila-

delphia Trust Company both after and before they received the advice of their counsel to deliver the bonds or resign their position made demands upon the Pioche Mines Consolidated for a closing conference as a condition to their delivery of the bonds, which demands were made after they had received and read copies of the Settlement and Merger Agreements relative to the settlement relating to the old Debentures, and after they had received and read the letter of transmittal of April 17, 1944 setting forth the conditions under which the new income bonds were turned over to Fidelity from the Pioche Mines Consolidated; that Fidelity acted in collaboration with the Debenture Holders' Committee in keeping possession of the new Income Bonds.

Admission No. 69—Admit that confusion and delay were also created in Fidelity-Philadelphia Trust Company negotiations with Securities Exchange Commission in the attorney of record for Fidelity quoting parts of letter from attorney for Pioche Mines Consolidated and omitting other parts of the same letter, which were necessary for a true representation of its contents, and that this omission of important parts of the letter called for a letter addressed to the Securities Exchange Commission by Mr. Dwight's firm stating:

"The reason for sending this is that Mr. Clark undertook to quote in his letter to you a paragraph from my letter of June 21, but he neglected to quote another paragraph of the letter so that a completely wrong inference was given you. I am sending you

herewith in toto a copy of my letter of June 21 to Mr. Clark.

"Personally I do not understand Mr. Clark's actions and I think they are explainable only on the basis that Mr. Janney had suggested, namely, an endeavor merely to harass Mr. Janney and the Pioche Mines Consolidated."

Attached hereto and marked Exhibit Q-16 is a letter dated September 23, 1944, from Pioche Mines Consolidated to Fidelity-Philadelphia Trust Company, calling this action of their attorney to their attention. Also filed as exhibits the letter of September 25, 1944 from Dwight's firm to Securities and Exchange Commission marked Exhibit Q-17, and a letter of September 27, 1944, from Fidelity-Philadelphia Trust Company to Pioche Mines Consolidated marked Exhibit Q-18.

That the facts stated in said exhibits are true.

Admission No. 70—Admit that Fidelity-Philadelphia Trust Company at different times demanded a Settlement conference which would have required the Pioche Mines Consolidated, Pioche Mines Company and Nevada Volcano Mines Company to attend a conference with them in Philadelphia, without stating what provision in the Settlement Agreement required such a meeting, or what provision of Nevada law would permit it, so that the merger of these companies could take place at a conference.

Admission No. 71:—Admit that the full correspondence between the stockholders' meeting and the debenture holders based upon which, and the representations contained therein, the stockholders'

meetings relied when they voted their approval of the merger of the properties of Pioche Mines Company, Nevada Volcano Mines Company and Pioche Mines Consolidated, were sent to Fidelity-Philadelphia Trust Company enclosed in a letter dated January 3, 1945, which letter was duly received by them, a copy of which is attached hereto and marked Exhibit Q-19, and which gave notice to Fidelity-Philadelphia Trust Company of said representations to said stockholders' meetings and that they were relied on by the meetings in their vote, and which said enclosures more particularly comprised the following:—

August 6, 1943—Telegram—Pioche Mines Consolidated to Debenture Holders' Committee.

August 7, 1943—Telegram—Debenture Holders' Committee to Pioche Mines Consolidated.

August 10, 1943—Telegram—Pioche Mines Consolidated to Debenture Holders' Committee.

August 13, 1943—Telegram—Clark & Gerhard, members of Debenture Holders' Committee to Pioche Mines Consolidated.

November 29, 1943 — Telegram — Stockholders' Meeting to Debenture Holders' Committee.

November 30, 1943—Telegram—Debenture Holders' Committee to Pioche Mines Consolidated.

November 30, 1943 — Telegram — Stockholders' Meeting to Debenture Holders' Committee.

December 1, 1943—Telegram—Debenture Holders' Committee to Pioche Mines Consolidated.

December 1, 1943 — Telegram — Stockholders' Meeting to Debenture Holders' Committee.

December 2, 1943—Telegram—Debenture Holders' Committee to Pioche Mines Consolidated.

December 2, 1943—Telegram—Pioche Mines Consolidated to Debenture Holders' Committee.

December 3, 1943—Letter—Debenture Holders' Committee to Pioche Mines Consolidated. "The assumption in your night letter of the second is correct."

all of which are filed as Exhibits in Affidavit of John Janney in support of Motion for Deposit in Court and marked Exhibit SM-2 through SM-12, inclusive.

That a copy of the letter of January 3rd, 1945 enclosing correspondence with the Debenture Holders' Committee based on which the merger was voted by stockholders' meetings was sent to the holders of non-negotiable receipts for deposited debentures c/o Percy H. Clark, chairman of the Debenture Holders' Committee, by order of the Board of Directors of Pioche Mines Consolidated, a copy of which is attached hereto and marked Exhibit Q-20.

Admission No. 72:—Admit that after stockholders' meeting of Pioche Mines Consolidated voted the merger and before the passing of the titles to the mining properties were made final and irrevocable for filing the final papers with the Nevada Secretary of State, a letter dated December 21, 1943, addressed to the Debenture Holders' Committee and duly received by them gave notice that the Merger Agreement was approved by the stockholders relying on their representations as follows:

> "We accept the statement of the debenture holders' committee as a statement of responsible parties to the effect that the consents have been obtained to the settlement agreement as written, and without modification or reservation, based on which promises the stockholders' meeting has by ballot voted a majority vote in favor of the approval of the settlement and merger agreements."

and that a copy of this letter is filed as Exhibit Baker 84, attached to the Affidavit of Richard K. Baker on file herein.

Admission No. 73:—Admit that it was the intention of Fidelity-Philadelphia Trust Company to use said closing settlement as a medium of further negotiations to the advantage of Fidelity-Philadelphia Trust Company, and which could be controlled by them and by the Debenture Holders' Committee, so as to create delays and confusion to further hold inoperative the properties of Pioche Mines Consolidated.

Admission No. 74:—Admit that Debenture Holders' Committee acknowledged to Pioche Consolidated that Settlement Conference would create complications by stating that the filing of the Merger Agreement will make the holding of a complicated settlement unnecessary.

Admission No. 75:—Admit that on November 3, 1943, Fidelity-Philadelphia Trust Company was sent, in due course of post received, a letter from Pioche Mines Consolidated, a copy of which is attached to the Affidavit of Richard K. Baker on file

herein, and marked Exhibit Baker—57, in which Fidelity-Philadelphia Trust Company was notified of the following telegram

> "In re your telegram seventh if auditor will certify that the bonds represented by your committee are obligated to accept new securities for old in accordance with terms of settlement agreement, obligation effective as soon as merger is consummated by stockholders approving merger contract and filing same with secretary of state, would that conform to your authority and bind your debenture holders as implied in your telegram of August fifth. Please answer yes or no."

and that the answer to said telegram was "Yes"; that in said letter Pioche Mines Consolidated offered to consummate the merger in accordance with the terms of the Settlement Agreement, asking that Fidelity-Philadelphia Trust Company make definite the Debentures which were obligated to immediate conversion in accordance with the telegram above quoted, and Debentures which would remain outstanding subject to further negotiations, or to cash payment, and that said letter concluded as follows: —"We appeal to you for your cooperation in making it possible to immediately consummate the merger and go forward with the business before us."

Admission No. 76:—Admit that the attitude of Fidelity-Philadelphia Trust Company with reference to the Settlement Agreement from November 3, 1943 on, was to make it impossible for the Settle-

ment Agreement to be carried into effect, in spite of the long delayed definite committment of Debenture Holders' Committee that all on Fidelity-Philadelphia Trust Company list were committed to immediate exchange.

Admission No. 77:—Admit that the actions taken by Fidelity-Philadelphia Trust Company to obstruct the Settlement Agreement were in collaboration with the Debenture Holders as represented by the Debenture Holders' Committee and their associates. That actions taken by Fidelity-Philadelphia Trust Company were taken after the letter of October 9, 1944 (Exhibit DM-17 attached to Affidavit of John Janney in support of Motion for Deposit in Court) stating that "We will deliver the securities when we have received appropriate instructions from your Committee."

Admission No. 78:—Admit that the letters attached to the Answer to the Supplemental Complaint, and marked Exhibit 1, 2 and 3, were written by the respective parties by whom said copies purport to have been written and delivered to the addressees to whom the copies purport to have been addressed, and that said copies are true copies of the originals, and that the facts stated in said Exhibit 1 and 2 are true.

Admission No. 79:—Admit that continuously from January 1, 1944 until October 6, 1944 stockholders of Pioche Mines Consolidated were ready, able and willing to purchase preference notes of Pioche Mines Consolidated in excess of $50,000, and would have purchased said preference notes except for the acts

of the Fidelity-Philadelphia Trust Company in withholding the new securities and in refusing to exchange said securities, that the refusal to exchange securities cast doubt upon the preference features of the preference notes and rendered them unsalable.

Admission No. 80:—Admit that Pioche Mines Consolidated's transmittal of securities to Fidelity-Philadelphia Trust Company (Exhibit W-11) was itemized and afforded the basis for checking the securities transmitted, and gave itemized accounting of securities not transmitted with reasons for withholding same;

That the requisition of Fidelity-Philadelphia Trust Company was not completely itemized and was incomplete and misleading;

That Fidelity-Philadelphia Trust Company did not reply to Pioche Mines Consolidated transmittal letter of April 17, 1944 (Exhibit W-11) and made no effort to clear the facts on which their requisition was based;

That Fidelity-Philadelphia Trust Company failed to make any effort to clear up the bond account in order to delay or make impossible completing the Settlement Agreement and intended to involve Pioche Mines Consolidated in further litigation.

Admission No. 81:—Admit that Pioche Mines Consolidated has endeavored to make a lease of its properties, and that each prospective lessee approached has refused to make a lease until all doubt has been removed as to completing the Settlement and Merger, and that the refusal of Fidelity-Phila-

delphia Trust Company to return, or deliver, the new income bonds, and the failure of the Debenture Holders to surrender for exchange the old debentures, has barred and prevented any successful negotiations of the long term lease.

Admission No. 82:—Admit that on April 17, 1944 Pioche Mines Consolidated sent to you income bonds and stock in accordance with a letter from them to you of even date, a copy of which is attached to the Affidavit of E. G. Woods on file herein and marked Exhibit W-11, and that on that date you had received copies of, or knew of, the communications dated November 30, November 30, December 1, December 1, December 2, December 2 and December 3, 1943, copies of which are attached to the Affidavit of John Janney in support of Motion for Deposit in Court, and marked respectively Exhibit SM 6, 7, 8, 9, 10, 11 and 12.

Admission No. 83:—Admit that in spite of the representations which you knew were made by the Debenture Holders' Committee to the stockholders' meeting in order to secure their favorable vote in approval of the merger and settlement, you continued to act under the direction of the Debenture Holders' Committee, both as to the debentures which they had deposited under the depository agreement, and as to the income bonds which later were sent you under an agreement between yourselves and Pioche Mines Consolidated, as expressed in your letter of request and their letter of transmittal of said income bonds.

Admission No. 84:—Admit that immediately fol-

lowing the filing of Merger Agreement with the Secretary of State of Nevada, at a meeting of the Board of Directors of Pioche Mines Consolidated, John Janney, Trustee, executed and delivered to Pioche Mines Consolidated a deed conveying the Mill Site referred to in paragraph XIII, a, of the Supplemental Complaint.

Admission No. 85:—Admit that the Merger Agreement was ratified and approved by all of the beneficial owners of the stock in Nevada Volcano Mines Company held by John Janney in the Volcano Trust referred to in paragraph XIII, b, of the Supplemental Complaint, that title to all of the properties formerly owned by Nevada Volcano Mines Company has been vested in Pioche Mines Consolidated by virtue of the merger, and no shares of the merged company have been issued in exchange for any of said shares of Nevada Volcano Mines Company held in said Volcano Trust, and said Volcano Mines shares held in trust under the Volcano Trust have been turned in to Pioche Mines Consolidated duly endorsed.

Admission No. 86:—Admit that the alleged fee claimed in large amount by C. M. Hawkins in a petition filed in this case as set forth in paragraph 13C of Supplemental Complaint represented a fictitious claim by said Hawkins which was withdrawn by him and that he delivered to the Company a note for $10,000 being held by said Hawkins and which was shown in the Simon Audit of November 7, 1943 as alleged in said Supplemental Complaint as well

as the certificate of Pioche Mines Consolidated stock being held by him, and a release to the Company from any and all liability to said Hawkins in exchange for a general release from the company to said Hawkins.

Admission No. 87:—Admit that neither Debenture Holders' Committee, nor any of the debenture holders have exerted any efforts to sell any of the preference notes mentioned in paragraph XIII, e, of the Supplemental Complaint; that they have done things for the purpose of preventing the sale of said Preference Notes.

Admission No. 88:—Admit that neither Debenture Holders' Committee, nor any of the debenture holders, have used any effort to obtain or negotiate a lease of any of the properties of Pioche Mines Consolidated.

Admission No. 89:—Admit that on October 21, 1942, Richard K. Baker had obtained the written consent of at least 80% of all creditors (other than deposited debenture holders) of Pioche Mines Company and of Pioche Mines Consolidated to the Settlement Agreement.

Admission No. 90:—Admit that on October 21, 1942 John Janney had obtained the written consent of at least two-thirds of all of the stockholders of Pioche Mines Consolidated to the Settlement Agreement.

Admission No. 91:—Admit that each and all of the letters and telegrams attached, to the affidavit of

John Janney in support of Motion for Deposit in Court and marked respectively, PC 1 to 13 inclusive, and DM 1-39 inclusive, and to the affidavit of Richard K. Baker in Support of Motion to Intervene etc. and marked, respectively, Baker 2 to 85 inclusive, and to the Affidavit of E. G. Woods in support of Motion for Deposit in Court and marked, respectively, W 1 to 13 inclusive, and to the Affidavit of T. Mitchell Hastings on file herein and marked H 1 to 21 inclusive, and to the Affidavit of Francis G. Shaw on file herein and marked S 1 to 5 inclusive, and attached hereto and marked Q 1 to 20 inclusive, are true copies of originals and that said originals were signed by the party who purports to have signed them, and that each original was received in due course by the addressee thereof.

Admission No. 92:—Admit that the exhibit attached to the Affidavit of Richard K. Baker in Support of Motion to Intervene etc. and marked Exhibit "Baker 1" is a full, accurate and complete copy of the minutes of the meetings of the stockholders of Pioche Mines Consolidated held at Pioche, Nevada July 19, 1943 and that George B. Thatcher and John Thatcher attended said meeting.

Respectfully requested,

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Attorney for Pioche Mines Consolidated, Inc., one of the Defendants.